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No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY, as Temporary Co-Administrators c.t.a., of the Estate of Bernard P. Birnbaum, Deceased,

Petitioners,

v.

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

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QUESTION PRESENTED

Does a taking occur, requiring just compensation under the Fifth Amendment to the United States Constitution, when a State requires a nursing home to remain in operation at a substantial loss despite the owners' desire to close the facility?

PARTIES TO THE PROCEEDINGS

Petitioners to this proceeding are Janice Birnbaum and Saul Birnbaum, as Executors, and Ilene L. Flaum and Central Trust Company, as Temporary Co-Administrators c.t.a., of the Estate of Bernard P. Birnbaum, Deceased. Petitioner Central Trust Company's parent corporation is Midlantic Corporation. Respondent is the State of New York.

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Petitioners Janice Birnbaum and Saul Birnbaum, as Executors, and Ilene L. Flaum and Central Trust Company, as Temporary Co-Administrators c.t.a., of the Estate of Bernard P. Birnbaum (collectively "the Estate" or "petitioner") respectfully pray that a writ of certiorari issue to review the judgment of the Court of Appeals of New York entered in the above entitled-proceeding on June 8, 1989.

OPINIONS BELOW

The opinion of the New York Court of Appeals is reported at 73 N.Y.2d 638, 541 N.E.2d 23, 543 N.Y.S.2d 23, and is reprinted in the appendix hereto ("App.") at 1a. The order on rehearing is reported at 74 N.Y.2d 893 and reprinted at App. 13a. Previous orders of the Court

of Appeals dismissing interlocutory appeals are reported at 63 N.Y.2d 675 and at 68 N.Y.2d 641, 496 N.E.2d 231, 505 N.Y.S.2d 72, and are reprinted at App. 46a, App. 47a and App. 43a. The Court of Appeals' opinion sought to be reviewed considered various decisions of the Supreme Court, Appellate Division (Fourth Department), reported at 143 A.D.2d 544, 533 N.Y.S.2d 411 (App. 14a), 112 A.D.2d 40, 490 N.Y.S.2d 411 (App. 44a), and 99 A.D.2d 652, 471 N.Y.S.2d 547 (App. 48a), a decision of the Court of Claims reported at 138 Misc.2d 402, 524 N.Y.S.2d 958 and reprinted at App. 16a, and an unreported decision of the Court of Claims reprinted at App. 50a.

Petitioner's takings claim had been previously considered in the Supreme Court of Erie County, New York. By its decision in *People* v. *Abbott Manor Nursing Home*, 70 A.D.2d 434, 421 N.Y.S.2d 451 (1979), *aff'd*, 52 N.Y.2d 766, 417 N.E.2d 1002, 436 N.Y.S.2d 614 (1980), the Appellate Division determined that the Supreme Court was without jurisdiction to adjudicate the takings claim and that the action should have been brought in the Court of Claims. Although petitioner seeks review of the decisions arising from its subsequent Court of Claims action, decisions in the previous action are reprinted in the Appendix at pages 121a, 122a, 130a, 133a, 138a. 141a, 145a, 150a and 156a for the Court's reference because the decision sought to be reviewed here relied on findings made therein.

JURISDICTION

The decision of the New York Court of Appeals rejecting petitioner's takings claim under the Fifth and Fourteenth Amendments was entered on June 8, 1989. App. 1a. A timely petition for rehearing was filed on July 6, 1989, and denied on October 19, 1989. App. 13a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

PERTINENT CONSTITUTIONAL PROVISIONS

The Takings Clause of the Fifth Amendment to the United States Constitution provides: "[P]rivate property [shall not] be taken for public use without just compensation." U.S. Const. amend. V, cl. 5. This prohibition is made applicable to the States through the operation of the Due Process Clause of the Fourteenth Amendment, which provides in pertinent part: "No State shall * * * deprive any person of life, liberty, or property, without due process of law * * *." U.S. Const. amend. XIV, § 1, cl. 3. *See Chicago, B. & Q. R.R.* v. *Chicago*, 166 U.S. 226, 239 (1897).

STATEMENT OF THE CASE

Before his death on February 13, 1976, Bernard P. Birnbaum owned and operated Abbott Manor Nursing Home ("Abbott Manor") in Buffalo, New York. The nursing home was licensed pursuant to the provisions of Article 28 of the New York Public Health Law as a profit-making enterprise, App. 53a, although at the time of Birnbaum's death, Abbott Manor was operating at a loss of approximately $20,000 to $30,000 per month. App. 55a. At all relevant times, the home had approximately 84 residents. *Id.*

As co-executor of his brother's estate, petitioner Saul Birnbaum notified the State of New York of Bernard's death on February 14, 1976. By letter dated February 27, 1976, the State's Regional Health Director informed the executor that "[d]ue to the recent death of your brother who was the sole proprietor of the Abbott Manor Nursing Home, the facility no longer has a legally established operator." App. 54a. It was therefore necessary to find a new operator who could be licensed by the State if the facility was to remain open. The Director further stated that any transfer of ownership had to be approved, and that termination of the home's operations as a health

facility could be accomplished only by following certain procedures.[1]

There followed a series of meetings and exchanges of correspondence between the Estate and the State in which the parties attempted to accommodate the State's insistence that Abbott Manor remain open while addressing the fact that the facility was without a licensed operator. *See* App. 57a-61a. It was the State's position that the home could not be closed because no alternate facilities were available; the Estate, meanwhile, wanted to close the home or, failing that, to find some method by which a legally established operator could take over the home and relieve the Estate of its $20,000 to $30,000 per month losses. Most discussions centered around the possibility that a receivership might be established to operate the home with a guarantee from the State of reimbursement of all operating expenses and a fair rental value to the Estate.

When these efforts appeared stalled by the State's inability to find a receiver and its unwillingness to agree to proposed terms of the receivership, the State in June 1976 solicited a written request from the Estate for an extension of the operating certificate of Abbott Manor to address, at least temporarily, the fact that Abbott Manor continued to function without a licensed operator. Counsel for the Estate complied with this request, but noted that the Estate "is not desirous of continuing its direct operation of the Abbott Manor Nursing Home indefinitely and one of its principal objectives continues to be the early transfer of this home to a new operator acceptable to the Department on terms acceptable to all." App. 63a.

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[1] Applicable state statutes required 90 days notice of intent to close and approval of the Commissioner. *See* N.Y. Comp. Codes R. & Regs., tit. 10, § 401.3(g) (1986), which at the time of the State's application for an injunction was found in identical form in N.Y. Comp. Codes R. & Regs., tit. 10, §§ 701.3(f), 401.3(f). App. 2a n.1.

When the parties were still unable to agree on the terms of a receivership, counsel for the Estate informed the State that due to the "staggering * * * operational deficiencies" which made continued operation of the home without reimbursement from the State inconsistent with fiduciary duties, App. 66a, the Estate was unwilling to allow the home to remain open after August 31, 1976 without immediate reimbursement for losses. In the absence of such an agreement, the Estate sent notices to next of kin that the home would be closed and that all residents should be removed from the home by September 7, 1976.

The State responded by commencing an action in the Supreme Court of Erie County, New York to enjoin petitioner from closing the nursing home, insisting on its continued operation until the Commissioner of Health saw fit to allow its closure. The State received a temporary restraining order prohibiting removal of patients from Abbott Manor pending determination of the issues.

In its answer, the Estate denied that it had failed to give appropriate notice and alleged that the Commissioner's refusal to approve closure of the home or transfer to an appropriate operator was arbitrary and capricious. The Estate urged that, under state law, appointment of a receiver was the proper means by which the State could keep the home operational. That appointment, the Estate understood, would relieve it of financial responsibility for Abbott Manor. *See* N.Y. Pub. Health Law § 2810 (McKinney 1985). The Estate further urged that it had operated Abbott Manor since Bernard Birnbaum's death at the insistence of the State and that to compel it to operate Abbott Manor at a loss "is an unconstitutional taking of property," App. 72a, for which it was entitled to just compensation.

The trial court appointed two employees of the nursing home as receivers, effective October 20, 1976. App. 156a. Its order granted petitioner the right to a hearing if the

State determined that it would not pay the actual costs of the care and treatment of patients, including rental value of the property. When the State denied these claims, the Estate moved in December 1976 for a hearing to determine the proper compensation. The Supreme Court held the requested hearing and ruled on December 29, 1976 that the State had to pay the Estate the costs of running the facility and a fair rental return. App. 145a. The State avoided compliance with the court's reimbursement order by taking an immediate appeal, which under state law automatically stayed the order.

Thus, the serious financial difficulties of Abbott Manor continued, and the trial court was compelled on January 10, 1978 to direct the receivers to issue a 90-day notice of closure. The receivers sought a twelve-month extension of the receivership due to the shortage of available beds in other facilities. The State opposed continuation of the receivership without offering a suggestion as to the care of the patients. On May 8, 1978, the court terminated the receivership and appointed the State Commissioner of Health as a successor receiver to "take full responsibility for the operation and maintenance of said facility and * * * for all operating and maintenance expenses during the period of his appointment * * *." App. 139a. The order further required the Commissioner to pay the expenses of the prior receivership, including rental value of the property. Again, the State again avoided the court's order by filing an appeal.

During the course of the next year, the State was apparently successful in finding alternate facilities in which Abbott Manor residents could be placed. All patients were moved from the nursing home by August 1979, and the receivership was terminated on September 14, 1979. App. 130a.

On the State's appeal, the Appellate Division held that the Supreme Court was without jurisdiction under New York law to determine "who should bear the operating

losses," App. 127a, and that the New York Court of Claims had sole jurisdiction over the Estate's claim that it was "entitled to be compensated for its actual costs for providing the services for the patients therein until it be permitted to close * * *." App. 124a. The Court of Appeals affirmed. App. 121a.

Petitioners then pursued their claim in the Court of Claims, alleging, as stated by the Court of Appeals, "that the imposition of the receivership, which essentially required that [petitioners] remain in business against their will, was a 'taking' under the Federal and State Constitutions, for which fair compensation was now required." App. 5a.

The Court of Claims agreed. App. 50a. Relying most directly on this Court's decision in *United States* v. *Pewee Coal Co.*, 341 U.S. 114 (1951), the court found that "the imposition of the Receivership, a possessory remedy, by the Supreme Court of the State of New York as the remedial device to respond to the State's insistence that the Abbott Manor Nursing Home remain operative * * * constituted a 'temporary-taking' which 'requires the Government to pay fair [sic] compensation to the owner of the property for its use.'" App. 115a, quoting *Pewee Coal Co.*, 341 U.S. at 119. The Court found no other conclusion reasonable in light of "the deprivation of the owners' right to use or dispose of their property," App. 115a, and ordered the State to pay petitioner some $542,000 for fair monthly rental, insurance costs, payroll, inventory, and other expenses for the period of the receiverships—October 20, 1976 to September 14, 1979. The Appellate Division affirmed on the basis of the opinion of the Court of Claims. App. 48a.

In reversing, the Court of Appeals answered in the negative the question of "whether a taking occurs[] when a business is required to continue operations at a loss * * *." App. 7a. Although recognizing this Court's admonition in *Brooks-Scanlon Co.* v. *Railroad Comm'n*, 251

U.S. 396, 399 (1920), that under the Fifth Amendment a person cannot be compelled to carry on a business at a loss, the Court of Appeals believed that "[m]odern cases have emphasized the narrowness of the *'Brooks-Scanlon'* rule." App. 8a. Thus, the Court held that requiring the Estate to provide nursing home services at a loss "did not immediately constitute a taking." *Id.*

Although conceding that the State's actions had a negative economic impact on the Estate because the home was required to run at a deficit, the court found the effect lessened because (a) the losses were not greater than those suffered prior to the State's control of the property, (b) the Estate could "recover" its investment by selling the nursing home, and (c) the existence of a regulation barring closure of a nursing home without prior approval of state authorities made it unlikely that the State's actions interfered with investment-backed expectations. App. 8a-9a.

The court found "[m]ore troubling," App. 9a, the contention that the imposition of the receivership was a *per se* physical taking. Nevertheless, "even accepting this characterization," *id.*, the court found that no taking had occurred. Instead, it found the State's actions justified under cases articulating a "nuisance" exception to the Takings Clause, *see e.g., Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. 470, 491-492 (1987), because closure of the nursing home would be a use of the property that "threatens an imminent injury to the public." App. 9a.

Finally, the Court of Appeals rejected the view that, even if the State's actions did not otherwise constitute a taking, they ripened into a taking in light of the duration of the interference with the right to terminate the business and the "State's unreasonable delay in closing Abbott Manor." App. 10a. The court's conclusion apparently was based on the fact that the Estate did not seek to have the nursing home closed during the pendency of the re-

ceivership—when, of course, it had been determined that the Estate was entitled to compensation.

REASONS FOR GRANTING THE WRIT

I. REQUIRING A PRIVATE BUSINESS TO REMAIN IN OPERATION AND TO BEAR SUBSTANTIAL OPERATING LOSSES, WITHOUT PROVIDING JUST COMPENSATION, CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT

This case presents an important question concerning the limitations on state appropriation of private property found in the Fifth Amendment to the United States Constitution. This question arises out of a heretofore successful effort by the State of New York to coerce continued operation of an unprofitable, privately-owned business—through appointment of a receiver to run the business—while requiring the owners to bear the losses. The imposition of such a burden is precisely the kind of harm the Fifth Amendment prohibits.

The court below held that "the imposition of a receivership which essentially required that respondents remain in business against their will" and incur significant operational losses did not constitute a taking under the Fifth and Fourteenth Amendments. App. 5a. Yet this Court has long held that coercion by the government of private business operations works a taking of private property for which just compensation is required. This longstanding principle, moreover, is reinforced in this case by application of the Court's recent takings jurisprudence, which the lower court seriously misstated and misapplied. The lower court's disregard of settled law in the context of this important and recurring area of constitutional law requires intervention by this Court.

A. This Court's Decision In *Brooks-Scanlon* Controls This Case

The decision of the New York Court of Appeals is directly inconsistent with this Court's decision in *Brooks-Scanlon Co.* v. *Railroad Comm'n, supra.* There, the Court considered whether a lumber company which had acquired a railroad could be compelled to continue to operate that railroad at losses of more than $1500 per month. Justice Holmes' opinion for the Court was characteristically direct in finding that such compulsion constituted a taking: "If the plaintiff be taken to have granted to the public an interest in the use of the railroad it may withdraw its grant by discontinuing the use when that use can be kept up only at a loss." 251 U.S. at 399. This Court has reaffirmed the *Brooks-Scanlon* holding on many occasions,[2] and numerous lower courts have assumed its vitality.[3] The facts of this case clearly bring it within the *Brooks-Scanlon* rule.

In disregarding that rule, the New York Court of Appeals began by stating the rule in its broadest form, quoting that portion of Justice Holmes' opinion which states that "[a] carrier cannot be compelled to carry on *even a branch of business at a loss*, much less the whole business of carriage." 396 U.S. at 399 (emphasis added). It has long been recognized, however, that despite the ap-

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[2] *See, e.g., Railroad Comm'n* v. *Eastern Texas R.R. Co.*, 264 U.S. 79, 85-86 (1924); *Bullock* v. *Florida ex rel. R.R. Comm'n*, 254 U.S. 513, 520-521 (1921); *Erie R.R.* v. *Board of Public Utils. Comm'rs*, 254 U.S. 394, 411 (1921). *See also Textile Workers Union* v. *Darlington Mfg. Co.*, 380 U.S. 263, 270 (1965) (dismissing as a "startling innovation" a construction of the National Labor Relations Act embodying the "proposition that a single businessman cannot choose to go out of business if he wants to * * *").

[3] *See, e.g., Indiana Sugars, Inc.* v. *ICC*, 694 F.2d 1098, 1099 n.3 (7th Cir. 1982); *In re Chicago, M., St. P. & P. R.R.*, 611 F.2d 662, 669 (7th Cir. 1979); *In re Penn Cent. Transp. Co.*, 494 F.2d 270 (3d Cir.), *cert. denied*, 419 U.S. 883 (1974); *Phillips* v. *Nelson*, 108 F.2d 725, 727 (10th Cir. 1939).

parent breadth of this phrase in the *Brooks-Scanlon* opinion, the Fifth Amendment limitation applies only where the government requires an entire business, rather than merely a segment thereof, to operate at a loss.[4] That is precisely what occurred here.

The lower court then attempted to "narrow" the *Brooks-Scanlon* rule. It cited four cases, each concerning recent application of the *Brooks-Scanlon* rule to railroads. All of these cases recognized the continuing authority of *Brooks-Scanlon*[5] but qualified its principle in certain limited ways, relying on the unique public service obliga-

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[4] In fact, one of the cases relied on by the court below for its holding is readily distinguishable on that very basis. *See Continental Air Lines, Inc.* v. *Dole*, 784 F.2d 1245, 1248 (5th Cir. 1986) (airline seeking compensation for period of required service over a particular route made "no contention that the award of less than the amount claimed will significantly affect its ability to continue in business or continue as a viable corporate entity"). Here, by contrast, the Estate was required to bear the losses attributable to the entire nursing home operation for a period of three years despite its desire to close down.

See also Fort Smith Light & Traction Co. v. *Bourland*, 267 U.S. 330, 332-333 (1925) ("A railway may be compelled to continue the service of a branch or a part of a line, although the operation involves a loss * * *. [T]he Constitution does not confer upon the company the right to continue to enjoy the franchise or indeterminate permit and escape from the burdens incident to its use"); *Burlington N. R.R.* v. *Department of Pub. Serv. Regulation*, 763 F.2d 1106, 1112 (9th Cir. 1985); *In re Central R.R.*, 485 F.2d 208, 214 (3d Cir. 1973), *cert. denied*, 414 U.S. 1131 (1974).

[5] *See National Wildlife Fed'n* v. *ICC*, 850 F.2d 694, 707 (D.C. Cir. 1988) ("The general rule * * * is that of *Brooks-Scanlon* * * *"); *Gibbons* v. *United States*, 660 F.2d 1227, 1233 (7th Cir. 1981) ("The constitutional principle embodied in these decisions retains its vitality * * *"); *Lehigh & N.E. Ry.* v. *ICC*, 540 F.2d 71, 82 (3d Cir. 1976) ("these decisions have never been repudiated by the Supreme Court, and this court does not dispute their fundamental principles * * *"), *cert. denied*, 429 U.S. 1061 (1977); *In re the Valuation Proceedings Under §§ 303(c) and 306 of the Regional Rail Reorganization Act*, 439 F. Supp. 1351, 1356-57 (S.C.R.R.R.A. 1977).

tions of railroads[6] and the extraordinary public interest in avoiding the "national disaster" threatened by massive railroad bankruptcies. *Lehigh & N.E. Ry.*, 540 F.2d at 74. Even in that context, moreover, the courts found the takings issue presented—for example by short periods of directed service by another railroad over a complaining carrier's lines—to be "a close and difficult question." *Id.* at 82. These cases, in short, were *sui generis* due to the particular context in which they arose.

The use of these precedents rested solely on the observation of the Court of Appeals that the nursing home industry is "pervasively regulated." App. 8a. Such an analysis quite clearly proves too much, for it would subject nearly every business in our society to the burdens heretofore uniquely justified by the nature of railroads and other common carriers. *Cf. Minnesota Ass'n of Health Care Facilities, Inc.* v. *Minnesota Dep't of Pub. Welfare*, 742 F.2d 442, 446 (8th Cir. 1984), *cert. denied*, 469 U.S. 1215 (1985).[7] Moreover, two of the cases relied on by the Court of Appeals determined that the governmental compulsion (directed service) actually worked a benefit to the complaining carrier, foreclosing claims to just compensation.[8] Here, there is no contention—and none is possible—that the Estate enjoyed *any* benefits from the State's compulsion. Rather, the Estate was

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[6] *See, e.g., Gibbons* v. *United States*, 660 F.2d at 1237. *See also United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 320-321 (1897).

[7] It is true, of course, that *Brooks-Scanlon* and its progeny stated the general principles relied on in the context of railroad regulation. Subsequent cases restricting the principle in this unique context, however, cannot be read to undermine its general application, as numerous courts have recognized.

[8] *Gibbons* v. *United States, supra*; *Lehigh & N.E. Ry.* v. *ICC, supra*.

simply ordered to provide at its expense a program of public welfare.[9]

At most, then, the cases relied on by the court below stand for the proposition that the *Brooks-Scanlon* rule has been modified in the unique context of railroad insolvencies to allow for a reasonable period during which alternative arrangements for service can be developed. Even if this rule were to have general application, however, it would not support the decision below. Assessing the "reasonableness" of a compulsion to carry on business against one's will would have to be measured against this Court's decisions governing takings claims, as the Court of Appeals appeared to recognize. The lower court's analysis of this important area of federal constitutional law is seriously flawed on several fronts, and presents this Court with an ideal opportunity to address the confusion presently extant concerning the dictates of the Takings Clause.

B. This Court's General Takings Jurisprudence, Seriously Misunderstood By The Court Below, Compels The Finding That A Taking Occurred

Quite apart from the existence of the *Brooks-Scanlon* rule, the imposition by government of a receivership to enforce a requirement that a business remain in operation and bear substantial operating losses plainly constitutes a taking under this Court's Fifth Amendment jurisprudence. The Court has held that the "essentially ad hoc, factual inquiries" involved in an evaluation of a claim that governmental action has worked a taking should include review of "[t]he economic impact of the regulation on the claimant and, particularly, the extent

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[9] It further appears that these decisions rest on a rejection of the *per se* physical takings doctrine embraced by this Court in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and discussed *infra*. *See Lehigh & N.E. Ry.*, 540 F.2d at 84 (dismissing reliance on physical nature of taking as "formalistic").

to which the regulation has interfered with distinct investment-backed expectations," as well as "the character of the governmental action." *Penn Cent. Transp. Co.* v. *New York City*, 438 U.S. 104, 124 (1978). *See also Hodel* v. *Irving*, 481 U.S. 704, 713-714 (1987); *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 426. The New York Court of Appeals all but ignored the character of the governmental action in its analysis and misstated the economic impact of the compulsion to remain in business.

To enforce the State's insistence that Abbott Manor remain open, New York law permitted the imposition of a receivership to control petitioner's property. The trial court found—and the Court of Appeals did not dispute—that a receivership under New York law is a "possessory remedy." App. 115a. Under the terms of this remedy, the State's agents were placed in possession of the Estate's property and required to devote it to a particular use at the Estate's expense. For nearly half of the receivership period, the receiver was in fact the State's Commissioner of Health,[10] and for the entire three-year period the State's dominion over Abbott Manor was complete.

The governmental action therefore constituted, in reality, a physical occupation of Abbott Manor. This Court has noted that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government * * * than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. The *Loretto* Court reaffirmed that the character of the gov-

[10] Although the possession and use of the Estate's property by the Commissioner demonstrate the unusually severe character of the government's action in this case, it matters not for purposes of takings analysis "whether the State, or instead a party authorized by the State, is the occupant." *Loretto*, 458 U.S. at 433 n.9.

ernment action is determinative "when the physical intrusion reaches the extreme form of a permanent physical occupation * * *." 458 U.S. at 426.[11]

Numerous decisions of this Court establish that the *per se* rule articulated in *Loretto* applies with equal force where, as here, the government's complete control of property is not indefinite. Thus, for example, in *Pewee Coal*, *supra*, the Court considered the takings claim of a coal mine operator whose property was possessed by the United States for some five months "to avert a nation-wide strike of miners." 341 U.S. at 115. The Court unanimously concluded that the government's action had worked a temporary taking of the property, and a majority agreed that the mine operator was entitled to recover operating losses sustained due to the government's operation of the mine.[12]

Similarly, the Court had no difficulty in concluding that the government's actions at issue in the wartime seizure cases worked a taking because the government took com-

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[11] *See also* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (citations omitted): "The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership" (quoted with approval in *Loretto*, 458 U.S. at 427 n.5).

[12] *See Pewee Coal*, 341 U.S. at 117-118 (Opinion of Black, J.) ("When a private business is possessed and operated for public use, no reason appears to justify imposition of losses sustained on the person from whom the property was seized"); *id.* at 121 (Reed, J., concurring) ("the Government's supervision of a losing business for a temporary emergency ought not to place upon the Government the burden of the losses incurred during that supervision unless the losses were incurred by governmental acts, *e.g., if the business would not have been conducted at all but for the Government* * * *") (emphasis added).

plete control of property interests, even though only for a period of years. *See, e.g., Kimball Laundry Co.* v. *United States*, 338 U.S. 1 (1949); *United States* v. *Petty Motor Co.*, 327 U.S. 372 (1946); *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945).[13] This Court recently reaffirmed its view that "'temporary' takings which, as here, deny a landowner all use of his property, are not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U.S. 304, 318 (1987).[14]

Under this Court's decisions, then, the character of the governmental action at issue here is dispositive of the takings claim. Even if the government's action somehow fell short of a *per se* temporary taking, however, it clearly worked an unusually severe interference with property rights, especially when considered in tandem with the economic impact of the regulation.

In assessing this factor of the takings analysis, this Court has held that "[a] statute regulating the uses that can be made of property effects a taking if it 'denies an owner economically viable use of his land * * *.'" *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 295-296 (1981) (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). *See also Kirby Forest Indus* v. *United States*, 467 U.S. 1, 14 (1984) ("a radical curtailment of a landowner's freedom to make use of or ability to derive income from his land may give rise to a taking

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[13] *See also Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579, 631 (1952) (Douglas, J., concurring) ("A permanent taking would amount to the nationalization of the industry. A temporary taking falls short of that goal. But though the seizure is only for a week or a month, the condemnation is complete and the United States must pay compensation for the temporary possession").

[14] The Court's temporary takings cases also provide a complete answer to the question—injected into the case for the first time by the Court of Appeals—of whether the delay in closing the home was a taking because it was of "unreasonable" duration. App. 10a.

within the meaning of the Fifth Amendment * * *"). Thus, for example, the Court has found it significant in upholding a challenged regulation that the regulation permits a profit or a reasonable return on investment in property, *Penn Central*, 438 U.S. at 136, or does not make it impracticable to continue a business at a profit. *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. at 495-496.

Here, the direct economic impact of the challenged governmental action was the imposition of substantial and continuing economic losses on a private entity.[15] These losses are not simply an estimate of the diminution of the value of property from some land use restriction, *see, e.g., Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 592 (1962), but rather real economic losses imposed by a governmental requirement that property be put to a particular use. The governmental action allowed no economically viable use of the Estate's property, and was so extreme as to require the Estate to bear losses from the compelled use. One can scarcely imagine a more severe economic impact from government regulation.

The New York Court of Appeals responded that the losses were "no greater than those suffered by the nursing home before the receivership began * * *." App. 8a. This statement is both unassailable and irrelevant. It is not disputed that the rate at which Abbott Manor experienced losses was generally unchanged after the receivership was imposed. The post-receivership losses, however, were suffered under the compulsion of the government and were in addition to those suffered prior to

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[15] This case is accordingly within the reach of *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922), which despite the decision in *Keystone* remains good law at least in the "rare takings case in which, as the result of a legisative enactment, it was impossible for the parties to engage in their business profitably." L. Tribe, *American Constitutional Law*, 591 n.14 (2d ed. 1988).

the receivership.[16] The lower court's response simply begs the question of whether losses suffered by order of the government, as opposed to those suffered in the uncoerced competitive marketplace, work a taking. As demonstrated, that question is readily answered in the affirmative by this Court's Fifth Amendment decisions.

The lower court also noted that the State's action "did not deprive respondents of the opportunity to recover their investment by selling the nursing home." *Id.* However, during the receivership—which, by all appearances, was of indefinite duration—the Estate's "opportunity to recover its investment" was wholly illusory. What the Estate could offer for sale was in fact a right to lose money on the required operation of a nursing home. As this Court noted in *Loretto*, "even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property." 458 U.S. at 436. So too here, the right to sell relied on by the court below was emptied of any value and did not alleviate the severe economic impact of the government's action.

Finally, the New York Court of Appeals relied on the bare assertion that the presence of a regulation barring a nursing home from immediately discontinuing services precluded an argument that the State's action interfered with investment-based expectations. The regulation relied on, however, merely stated that no nursing home "shall discontinue operation or surrender its operating

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[16] *Cf. Pewee Coal*, 341 U.S. at 118 (Opinion of Black, J.) (declaring it "immaterial that governmental operation resulted in a smaller loss than Pewee would have sustained if there had been no seizure of the mines. Whatever might have been Pewee's losses had it been left free to exercise its own business judgment, the crucial fact is that the Government chose to intervene by taking possession and operating control").

certificate unless 90 days' notice of its intention to do so is given to the commissioner [of health] and his written approval obtained." N.Y. Comp. Codes R. & Regs. tit. 10, § 401.3(g) (1986). This regulation can hardly be said to have put petitioner on notice that—despite the Estate's clearly and frequently stated intention to close the home prior to the imposition of the receivership—the commissioner would withhold his approval of such closure in favor of requiring the Estate to bear all losses associated with the home for a period of three years, or indefinitely.

II. BY RELYING ON THE NUISANCE EXCEPTION TO THE TAKINGS CLAUSE, THE COURT BELOW SANCTIONED A MUCH BROADER EXCEPTION THAN THIS COURT'S DECISIONS ALLOW

The court below found the Estate's contention that the State's action worked a physical occupation of its property "[m]ore troubling" than the regulatory takings claim. App. 9a. "Nevertheless," the court wrote, "even accepting this characterization," no taking occurred. *Id.* The lower court's *sole basis* for denying the Estate the compensation it would otherwise be owed was its belief that the government's action was insulated from a takings claim because that action denied a use of property that "threatens an imminent injury to the public." *Id.* (citing *Keystone Bituminous Coal Ass'n* v. *DeBenedictis*, 480 U.S. at 491-492). Nothing in this Court's decisions, however, or in any meaningful understanding of the Fifth Amendment, supports the application to this case of this so-called "nuisance exception" to the takings guarantee.

The nuisance exception traces its origin to *Mugler* v. *Kansas*, 123 U.S. 623, 668-669 (1887), where the Court held that a prohibition on the use of property for purposes deemed to be "injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for

the public benefit." This Court most recently considered the exception in *DeBenedictis*, where it reaffirmed its "hesitance to find a taking when the State *merely restrains uses of property* that are tantamount to public nuisances * * *." 480 U.S. at 491 (emphasis added).[17] Thus, the exception has been invoked to justify the prohibition, without compensation, on the *use* of such private property as a brewery, *Mugler* v. *Kansas*, *supra*, a brickyard, *Hadacheck* v. *Sebastian*, 239 U.S. 394 (1915), or a surface mine. *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962).

In no case, however, has the Court found that the nuisance exception alone justified a physical occupation of property by the government. Nor has the Court applied the exception to uphold a regulation that property be reserved for one use and one use only, let alone a use that imposed affirmative economic losses on a private party.[18] Yet such unprecedented application of the nuisance exception is precisely what the court below sanctioned in this case. The State did not simply restrain particular uses of the Estate's land; instead, it physically occupied that property, and required a particular use for the benefit of a small number of individual citizens at the Estate's expense.

The court below justified this imposition by equating the inquiry into the character of the government action

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[17] The Chief Justice has similarly described the nuisance exception as applicable to those situations where the government prohibits a property owner "from using its property *in a narrow set of noxious ways* * * *." *Penn Central*, 438 U.S. at 146 (Rehnquist, J., dissenting) (emphasis added).

[18] "The antinuisance justification under the police power, for example, might well excuse the state from having to pay compensation when it shuts down a landowner's pig farm, so long as it allows him other uses of his property. It will not excuse the state from paying compensation if it both shuts down the pig farm and takes possession of the land for itself." Epstein, *Takings: Descent and Resurrection*, 1987 Supreme Court Review 1, 17-18.

with an examination of the public purpose of the action, App. 7a (regulatory takings analysis requires inquiry into "the action's public purpose or 'character' "), and held that a taking does not occur when the government's action is supported by a strong public purpose. Thus, the Estate's failure to put its land to the use that the State felt would best serve the State's interests and those of the public was described as a threat of "imminent injury to the public," justifying the appropriation by the State of that property without compensation. App. 9a. Surely such reasoning turns on its head the Fifth Amendment's requirement of just compensation where property is taken for "public use."

Rather than an open-ended invitation to government to occupy land so that it may be employed for public interest purposes, the nuisance exception is narrowly grounded on the understanding that limited restraints on particular uses of property work to secure for all citizens a "reciprocity of advantage." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415. *See DeBenedictis*, 480 U.S. at 491. Thus, the Court has observed, " '[t]he nuisance exception to the taking guarantee is not coterminous with the police power itself.' " *DeBenedictis*, 480 U.S. at 491 n. 20 (quoting *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting)). Where, as here, the narrow office of the exception is forgotten, the exception completely swallows the constitutional rule and undermines the central purpose of the Takings Clause "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). *See also Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893).

The Estate, of course, does not dispute the power of the State to effectuate its laudible desire to provide nursing home services for the elderly. But, as this Court observed nearly 70 years ago, "a strong public desire to im-

prove the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 416.

III. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING, AND REQUIRE THIS COURT'S CONSIDERATION

As this Court has repeatedly observed, issues presented by the Takings Clause generally require "ad hoc factual inquiries." Yet the factual nature of cases arising under the Clause has not prevented this Court from reviewing numerous takings claims in recent years in an attempt to fashion a coherent and consistent jurisprudence under the Fifth Amendment. Despite these efforts, the state and federal courts have continued to find uncertain guidance in this Court's precedents,[19] and members of this Court have expressed the concern that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting, joined by Blackmun, J.).

The confusion of the lower courts is perhaps best demonstrated by comparison of the decision in this case with the recent decision of the same court in *Seawall Assocs.* v. *City of New York*, 74 N.Y.2d 92, 542 N.E.2d 1059, 544 N.Y.S.2d 542, *cert. denied*, 110 S.Ct. 500 (1989). In *Seawall*, the New York court determined that a taking occurred where the government prohibited owners of single-room occupancy properties from demolishing, altering or converting those properties for five years, and obligated them to refurbish the structures and keep them fully rented. In short, the law placed the property own-

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[19] *See, e.g., Orion Corp.* v. *State*, 109 Wash.2d 621, 653, 747 P.2d 1062, 1079 (1987), *cert. denied*, 108 S.Ct. 1996 (1988) (despite recent decisions, "the definitive answers, so necessary for state courts to make reasoned determinations concerning minimum federal due process requirements, remain unavailable").

ers in a business and forced them to remain in that business for a period of five years. 74 N.Y.2d at 110, 542 N.E.2d at 1068, 544 N.Y.S.2d at 551. So too here the governmental regulation forced the Estate to suffer the operation of a business on its property against its will for three years, yet the same court found that no taking occurred.

Such basic contradictions in the application and understanding of the Takings Clause require this Court's attention. We do not contend, of course, that this case is the vehicle by which all of the difficult and even unanticipated questions generated by the Takings Clause might be answered. But, on a fully developed factual record, it presents the Court with an excellent opportunity for the renewed vindication of the central purpose of the Fifth Amendment, which appears to have been lost on the lower courts in general and the New York Court of Appeals in particular: that where the government chooses affirmatively to employ private property to serve even the most laudible governmental functions, it may do so only by providing the just compensation demanded by the Constitution. Nothing more than a straightforward application of that principle is required to resolve this case.

CONCLUSION

For the foregoing reasons, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATE OF NEW YORK
COURT OF APPEALS

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4 No. 128

JANICE BIRNBAUM *et al.*,
Respondents,

v.

THE STATE OF NEW YORK,
Appellant.

OPINION

Robert Abrams, Attorney General (Clifford A. Royael, O. Peter Sherwood, Peter H. Schiff of counsel) for appellant.

Percival D. Oviatt, Jr., Rochester, for respondents.

WACHTLER, Ch. J.:

The question in this case is whether a "taking" of property occurs, giving rise to the obligation to pay fair compensation (NY Const art I, § 7; US Const 5th & 14th Amends), when the State requires a nursing home to remain open until reasonable alternative arrangements can be made for the continued care of the patients. We conclude that under the facts and circumstances presented here the State's actions, preventing the precipitous closing of a nursing home in contravention of the regulations of the Department of Health, did not constitute a "taking" of property under the Federal or State Constitutions.

The facility in question, known as "Abbott Manor Nursing Home" and situated in Buffalo, New York, was

operated by Bernard Birnbaum until his death on February 13, 1976. Shortly thereafter, the Executors of Bernard's estate, the respondents here, determined that the nursing home was currently unprofitable, primarily because the facility's medicaid reimbursement rate was insufficient to cover the actual cost of operation. Respondents pursued various avenues to attempt to rectify this situation. They sought an increase in the medicaid reimbursement rate, arguing that without immediate corrective action the operation of the nursing home could not continue. Respondents also sought to either sell the facility, or obtain a receiver who would operate the nursing home and guarantee reimbursement of all operating expenses.

These efforts proved unavailing, and on September 3, 1976, respondents sent telegrams to the next of kin of the nursing home patients receiving medicaid informing them that because the Department of Health refused to pay for medicine and medical care "we are unable to continue care", and, "[a]ccordingly, you are advised to make the necessary arrangements to have your relative removed no later than September 7, 1976 at 7:00 p.m." The kin of the approximately 30% of patients cared for by means other than medicaid received a somewhat fuller explanation.

The State, by order to show cause, immediately commenced an action in Supreme Court to enjoin respondents from closing the nursing home until the requirements of 10 NYCRR 401.3(g)[1] could be met. This section requires that the operator of a nursing home give 90 days notice, and obtain the approval of the Commissioner of Health, before closing a facility. The State also sought and obtained a temporary restraining order preventing

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[1] At the time of the State's application for an injunction the requirements now found in 10 NYCRR 401.3(g) were found in identical form in 10 NYCRR 701.3(f) and 401.3(f).

the displacement of patients until the merits of the action were heard. Respondents opposed the granting of an injunction, and counterclaimed, seeking both the appointment of a receiver "pursuant to § 2810 of the Public Health Law of the State of New York", and full reimbursement from the State for the costs of operating the nursing home.

Upon consideration of the merits, by order dated November 26, 1976 Supreme Court appointed two long-time employees of the nursing home as co-receivers to operate the facility. By further order dated December 29, 1976, Supreme Court determined that the State was responsible for the actual cost of care and treatment during that period of receivership. The numerous hearings and orders that followed are substantially recounted in *People v Abbott Manor Nursing Home* (70 AD2d 434, *affd for reason stated* 52 NY2d 766) and need only be summarized here. On January 10, 1978 Supreme Court directed the receivers to issue a 90-day notice of closure due to the nursing home's continued financial difficulty. The receivers, however, citing the shortage of alternative facilities that could care for the nursing home's patients, moved in Supreme Court for an order continuing the receivership for one year. The State opposed the motion and argued that, if necessary, any extension should be for a more limited duration; respondents, however, did not oppose the extension of the receivership. On May 8, 1978, Supreme Court temporarily resolved the issue by terminating the appointment of the present receivers, and appointing the Commissioner of Health as receiver in their place, with the term of the new receivership to survive until further order of the court.

Following the issuance of the December 29, 1976 order providing them with the right to fully recover their operating costs, respondents' attitude toward the prospect of closing the nursing home changed dramatically.

Thus on December 20, 1978 respondents sought and received a temporary restraining order barring the State from removing any medicaid patients from Abbott Manor, except voluntarily or in an emergency. Indeed, in support of this request respondents argued that closure was not in the "public interest" because of the lack of available alternative facilities for patients, and decried the affect of closure on patients who were "reluctant to leave" the "desirable" facility, where they have received "very satisfactory quality of medical care and services * * * during the period of their residence". Nevertheless, the State was apparently successful in finding alternative means of care for the nursing homes patients, and after vacating the facility the Commissioner of Health moved in Supreme Court for an order terminating the receivership. This order was granted over the objection of respondents, and on September 14, 1979 the receivership was terminated, ceasing Abbott Manor's operation as a nursing home.

Eventually, all issues concerning the propriety of the appointment of the various receivers and the award of full operating costs were consolidated in one appeal in the Appellate Division, Fourth Department. That court first held that although PHL § 2810 did not specifically authorize the appointment of a receiver in the situation presented, the receivership appointment nevertheless were proper under the equitable powers of the court. The Appellate Division then determined, however, that the Court of Claims had sole jurisdiction regarding respondents' claim that they were "entitled to be compensated for [the] actual costs for providing the services for the patients" during the reeciversh‌ip period, and, therefore, the court dismissed respondents' claim for compensation (*People v Abbott Manor Nursing Home, supra* at 436). This Court affirmed on the opinion by Justice Witmer at the Appellate Division (*People v Abbott Manor Nursing Home*, 52 NY2d 766).

Respondents then commenced the present action in the Court of Claims, alleging that the imposition of the receivership, which essentially required that respondents remain in business against their will, was a "taking" under the Federal and State Constitution, for which fair compensation was now required. Respondents moved for summary judgment on this issue and the Court of Claims granted the motion, holding that the State's actions were analogous to the wartime temporary seizure cases (*see, e.g., United States v Pee Wee Coal Co.*, 341 US 114). The Appellate Division affirmed without opinion.[2] We now reverse.

I

The nursing home industry, without a doubt, "is subject to extensive State regulation pursuant to article 28 of [the Public Health Law] and title 10 of the Official Compilation of Codes, Rules and Regulation of the State of New York" (*Matter of Sigety v Hynes*, 38 NY2d 260, 268). The Legislature has long recognized that in the health care industry "duplication of facilities and * * * under-utilized services in one area contrast with long waiting lists for facilities in other areas, * * * result-[ing] in higher costs [and] * * * threaten[ing] access to care and emergency services for many of our citizens" (Legislative Findings and Purpose of L.1969, c. 957). In

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[2] The Court of Claims grant of summary judgment on this issue left other causes of action pending, and the State's initial motion for leave to appeal was dismissed for non-finality (63 NY2d 675), as was the State's first direct appeal on constitutional grounds (68 NY2d 641). Thereafter, respondents moved in the Court of Claims for attorney's and accountant's fees. The Court of Claims awarded fees to respondents, and directed entry of a final judgment indicating that respondents had discontinued or abandoned all causes of action for which they had not been awarded summary judgment. The Appellate Division affirmed without opinion. The State now appeals pursuant to leave granted by this Court, bringing up for review both the prior non-final grant of summary judgment, and the later award of fees (CPLR 5602, 5501[a]).

an effort to control costs and ensure adequate provision of nursing home facilities, under the Public Health Law a nursing home cannot be established or operated unless "there is a public need therefor" (*Matter of Hamptons Hosp. v Moore*, 52 NY2d 88, 93; *see*, PHL §§ 2801-a(3), 2805). The rates charged for nursing home care are also strictly controlled (*see*, PHL §§ 2807; 2808).

This regulatory scheme, designed to tailor supply closely to demand in an effort to contain health care costs, largely protects the nursing home operator from competition. It also results in a lack of excess nursing home facilities, which poses an obvious threat to the continuity of essential services if an operator closes a facility. In contemplation of this predicament, the Commissioner of the Department of Health promulgated section 401.3(g) of article 10 of the NYCRR, which states that no nursing home "shall discontinue operation or surrender its operating certificates unless 90-days notice of its intention to do so is given to the Commissioner [of Health] and his written approval obtained."

In the case now before us, although Abbott Manor was operating at a loss, the State refused to allow the closure of the facility by respondents before they complied with 10 NYCRR 401.3(g). Respondents argue that this constituted a taking, because the State's actions "place[d] a burden on [respondents] to continue the operation of the Home at a substantial loss for the benefit of patients, public or the State of New York".

To determine if a taking occurred here, indeed we must assess whether respondents were alone required to shoulder a public burden which, in fairness, should have been the responsibility of the public as a whole (*see, e.g., Pennell v. City of San Jose*, 108 S. Ct. 849, 856; *French Investing Corp v City of New York*, 39 NY2d 587, 596-597). This analysis generally requires an ad hoc, factual inquiry using the increasingly familiar factors of the

economic impact of the government's action, its frustration of "reasonable investment backed expectations", and the action's public purpose or "character" (*see, e.g., Penn Central Transportation Co. v New York City*, 438 US 104, 124; *Kaiser Aetna v United States*, 444 US 164, 175; *Rochester Gas & Elec. v PSC*, 71 NY2d 313, 324). Even if the economic impact upon an owner of property is minimal, however, and does not significantly affect investment backed expectations, the Supreme Court of the United States has held that where a "permanent physical occupation" has occurred, the "character of the government action" may become determinative and establish the presence of a taking (*Loretto v Teleprompter Manhattan CATV Corp.*, 458 US 419, 426). Nevertheless, compensation will not be required, even where governmental destruction of property is involved, if the government's action was necessary to stop an illegal activity, or prevent an impending danger emanating directly from the use or condition of the property (*see, e.g., Miller v Schoene*, 276 US 272, 280; *Keystone Bituminous Coal Assn v DeBenedictis, supra* at 490, 492 n 22).

While we have not previously analyzed how these factors should be applied, and whether a taking occurs, when a business is required to continue operations at a loss, the question is not novel; it has been recognized by the United States Supreme Court (*see, e.g., Brooks-Scanlon Co. v Railroad Comm.*, 251 US 396; *Regional Rail Reorganization Act Cases*, 419 US 102, 122) and thoroughly considered in the Federal Courts (*see, e.g., Matter of the Valuation Proceeding Under §§ 303[c] and 306 of the Regional Rail Reorganization Act*, 439 F Supp 1351 [Friendly, J]; *Gibbons v United States*, 660 F2d 1227; *Lehigh and New England Railway Company v Interstate Commerce Comm.*, 540 F2d 71]). This line of cases begins with *Brooks-Scanlon Co. v Railroad Comm.* (*supra* at 399), where Justice Holmes, writing for the Court, stated that under the Fifth Amendment a person

"cannot be compelled to carry on even a branch of business at a loss, much less the whole business". Modern cases have emphasized the narrowness of the *Brooks-Scanlon*" rule, however, and the limitation of a person's right to cease business operations consistently has been held not a per se taking where a pervasively regulated industry is involved, and there exists an administrative procedure requiring that permission be obtained from a regulatory agency before service to the public is terminated (*see, e.g., Gibbons v United States, supra; Lehigh and New England Railway Company v Interstate Commerce Comm., supra; Continental Airlines, Inc. v Dole*, 784 F2d 1245). Under these circumstances, the courts have concluded that a business "may be made to suffer interim reasonable losses, without compensation, for a reasonable period of time during which solutions accommodating the public and private interests can be devised" (*National Wildlife Federation v ICC*, 850 F2d 694, 708 [quoting *Lehigh and New England Railway Company v Interstate Commerce Comm., supra* at 82).

We conclude, under these principles, that the application of 10 NYCRR 401.3(g), to require that respondents continue providing nursing home services, did not immediately constitute a taking. Initially, it does appear that the State's actions had some negative economic impact upon respondents, because Abbott Manor continued to run at a deficit during the receivership period. The extent of this impact in real terms is greatly lessened, however, when it is recognized that the losses incurred during this period were no greater than those suffered by the nursing home before the receivership began, and that the State's action, in any event, did not deprive respondents of the opportunity to recover their investment by selling the nursing home. Furthermore, in light of the presence of regulation specifically barring a nursing home from immediately discontinuing services, the State's prevention of respondents' attempt to close Abbott Manor

did not, under any reasonable view, affect respondents' "investment backed expectations" (*see, Rochester Gas & Elec. v PSC, supra* at 325). More troubling, however, is respondents' contention that the action here was tantamount to a physical occupation of the property, so that the "nature of the government action" becomes dispositive and establishes a taking (*see, Loretto v Teleprompter Manhattan CATV Corp., supra* at 426). Nevertheless, even accepting this characterization, respondents' conclusion is not warranted.

"Long ago" stated the United States Supreme Court, "it was recognized that 'all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community' ", and that the State's actions to enforce this obligation is not a taking (*Keystone Bituminous Coal Ass'n v DeBenedictis, supra* at 492 [quoting *Mugler v Kansas*, 123 US 623, 665). Respondents in this case possessed the exclusive right to operate a nursing home solely because the public interest, as assessed by the Legislature and the Department of Health, required exclusivity. This grant by the State, while benefiting respondents, also put them in the position to create an immediate scarcity of medical care if services were terminated abruptly. When the State confers an exclusive franchise upon an individual incidental to providing a public good, it need not subject itself to the uncontrolled discretion of the individual to instantaneously create a public emergency. Instead, we conclude that the State may enforce the obligation, embodied in a regulation, that there shall not be immediate termination of nursing home services, because that use of the property threatens an imminent injury to the public (*see, Keystone Bituminous Coal Assn v DeBenedictis, supra* at 491-492).

Consequently, we agree with the apparently unanimous view of the courts that have considered the question, that under these circumstances the application of a regu-

lation requiring that a business not terminate services, used for a reasonable period of time so that an agency may devise solutions accommodating the public and private interests, is a valid regulation and does not constitute a taking of private property for public use (*see, e.g., Lehigh and New England Railway Company v Interstate Commerce Comm., supra* at 82; *Gibbons v United States, supra* at 1238; *Continental Airlines, Inc. v Dole, supra* at 1251-1252; *Matter of the Valuation Proceeding Under §§ 303[c] and 306 of the Regional Rail Reorganization Act, supra*, at 1371; *see also, Davidson v Commonwealth, supra* at 1318 [the government's assumption of the operation of a nursing home in response to a public emergency was a valid exercise of the police power, and not a taking]). Therefore, the application of 10 NYCRR 401.3(g) here, which barred respondents' closure of the nursing home at least until such time as they applied to the Commissioner of Health to do so, did not by itself constitute an immediate taking of respondents' property.

This is not to say that the State could force respondents to operate their business at a substantial loss indefinitely; it has been stated that there does come a time, after government has had a reasonable period to explore alternative solutions, when the individual's right to terminate a business venture becomes paramount (*see, e.g., Matter of the Valuation Proceeding Under §§ 303[c] and 306 of the Regional Rail Reorganization Act, supra* at 1371). However, while the matter is not without some difficulty, particularly due to the state of the record, we conclude that respondents are not entitled to recover based upon the State's unreasonable delay in closing Abbott Manor.

The record shows that respondents first attempted to close the nursing home without compliance with 10 NYCRR 401.3(g), were prevented from doing so by the

State, and in the process a receiver was appointed for the facility. Soon after the appointment of a receiver, respondents obtained an order, which proved erroneous, entitling them to full reimbursement for the cost of operating Abbott Manor during the receivership period. There is nothing in the record reflecting that respondents desired to close the nursing home following the receipt of this order; in fact, likely due to their belief that compensation would be forthcoming, during this period respondents apparently desired that Abbott Manor remain open. In any event, the facility was operated for approximately three years following respondents' initial attempt to close the nursing home, and the State's preventative action.

Respondents do argue, however, that any application under 10 NYCRR 401.3(g), which requires the Commissioner of Health's approval for the closing of a facility, would have been futile, because there were no alternative facilities available to care for Abbott Manor's patients; in fact, the Court of Claims accepted this contention. However, the fact remains that respondents' never made an application to close the facility under 10 NYCRR 401.3(g), which renders conjectural any conclusion on what would have occurred had a proper application been made. Moreover, on this record it appears that soon after respondents unlawfully attempted to close the nursing home their desire to close the facility ceased. Finally, and most importantly, respondents make no claim in this Court that the State required the operation of the nursing home against respondents' wishes beyond a reasonable time; instead, respondents' arguments are limited to the contention that they had an absolute right to close Abbott Manor, and that the State's initial intervention to keep the facility open constituted a taking. Consequently, under these circumstances we are unable to hold that the State's delay in closing the nursing home at some point became a taking.

In light of our conclusion that no taking occurred here, either immediately upon the State's prevention of the closing of Abbott Manor or at sometime thereafter, regardless of whether attorney's fees could have been awarded to respondents had they recovered on their claim, no attorney's fees may be recovered in this case.

Accordingly, the order of the Appellate Division should be reversed, with costs, and the claim dismissed.

* * * *

Order reversed, with costs, and claim dismissed. Opinion by Chief Judge Wachtler. Judges Kaye, Alexander, Titone, Hancock and Bellacosa concur. Judge Simons took no part.

Decided June 8, 1989

APPENDIX B

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the nineteenth day of October A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 899

JANICE BIRNBAUM, *et al.*,
Respondents,

v.

THE STATE OF NEW YORK,
Appellant.

A motion for reargument to the Court of Appeals in the above cause having been heretofore made upon the part of the respondents herein and papers having been submitted thereon and due deliberation thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied.

Judge Simons took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX C

SUPREME COURT OF THE
STATE OF NEW YORK
Appellate Division
Fourth Judicial Department

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PRESENT: CALLAHAN, J.P., DOERR, BOOMER, PINE, BALIO, JJ.

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY as Temporary Co-Administrators C.T.A. of the Estate of BERNARD P. BIRNBAUM, Deceased,

Respondents,

v.

STATE OF NEW YORK,

Appellant.

Claim No. 63695

The above named State of New York having appealed to this court from a judgment of the Court of Claims, entered in the Office of the Clerk of said court on October 27, 1987 and said appeal having been argued by Clifford Royael of counsel for appellant, Percival Oviatt of counsel for respondents, and due deliberations having been had thereon,

It is hereby ORDERED, That the judgment so appealed from be and the same hereby is unanimously affirmed with costs.

Entered: September 27, 1988

CARMEN S. LEONE
Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department,
Clerk's Office, Rochester, N.Y.

I, CARMEN S. LEONE, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York this Sep. 27, 1988.

[SEAL]

/s/ Carmen S. Leone
Clerk

APPENDIX D

STATE OF NEW YORK
COURT OF CLAIMS

Claim No. 63695

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY, as Temporary Co-Administrators c.t.a. of the Estate of BERNARD P. BIRNBAUM, Deceased,

Claimants

vs

THE STATE OF NEW YORK,

Defendant

DECISION WITH ATTACHMENT

[Filed Oct. 14, 1987]

APPEARANCES:

For the Claimants:

WOODS, OVIATT, GILMAN, STURMAN & CLARKE
By: Percival D. Oviatt, Jr., Esq. and
William G. Bauer, Esq., Counsel

For the Defendant:

THE HONORABLE ROBERT ABRAMS
Attorney General, State of New York
By: David L. Edmunds, Jr., Esq.
Assistant Attorney General, Counsel

McMAHON, J.

The instant claim has a long and tortured history.[1] With two companions, Claim Nos. 63694 and 65544, it stems from a dispute between the New York State Department of Health and the Estate of Bernard P. Birnbaum. The dispute began soon after Mr. Birnbaum's death on February 13, 1976.

At the time of his death, Mr. Birnbaum was the State licensed operator of the Abbott Manor Nursing Home (hereafter Abbott Manor) in Buffalo. Abbott Manor's operations were not profitable, and the Estate sought either to renegotiate its rate of Medicaid reimbursement from the State or to shut down operations completely. It was unsuccessful on both counts. The State obtained a temporary restraining order September 5, 1976 requiring Abbott Manor to remain open; and on November 4, 1976 obtained the appointment of coreceivers, two Abbott Manor employees, to run the operation nunc pro tunc as of October 20, 1976.

The Estate subsequently moved for a hearing to determine the compensation to be paid it during the receivership by the Department of Health, and for an accounting by the receivers.

[2] There followed a series of legal proceedings and hearings (all before Supreme Court Justice Theodore S. Kasler) in which the compensation to be paid the Estate for the reasonable rental value of Abbott Manor and for reim-

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[1] The Appellate Division decision in *People v. Abbott Manor Nursing Home*, 70 AD2d 434 (4th Dept 1979); and our unpublished memorandum decision in Claim Nos. 63695 and 63694, filed August 25, 1982, describe the background of this claim in detail. For convenience, we have also appended to this decision a 10-page chronological summary of the Abbott Manor legal proceedings supplied by Claimants' counsel.

[2] The next three paragraphs have been adopted almost verbatim from Claimants' pretrial memorandum.

bursement of costs incurred in connection with Abbott Manor's operation subsequent to the coreceivers' appointment were established by Court order. Such proceedings also determined that the State was liable for payment to the receivers of costs incurred in connection with the continued operation of Abbott Manor. The State resisted enforcement of the orders and refused to pay the Estate any compensation, or to pay the coreceivers the costs they were incurring. The State appealed from all such orders, obtaining an automatic stay of enforcement in each case. In several of the State's appeals, it failed to prosecute, apparently content with the automatic stay of enforcement that permitted it to ignore the orders.

Finally, at the direction of the Court, the coreceivers, on or around January 10, 1978 gave a 90-day notice of closure. About the same time the automatic stay of the State's obligation to pay the coreceivers their costs of operation was cancelled by reason of the State's failure to prosecute its appeals from the orders requiring it to make such payment.

Around March 6, 1978 the Court handed down a decision concerning the Estate's right to reimbursement for the fair rental value of the property, which replaced a decision dated June 30, 1977 on the same issue. On May 25, 1978 an order was made terminating the prior receivers, effective retroactive to May 8, 1978. This order also appointed the Commissioner of the Department of Health (Robert P. Whalen) as receiver and required him to pay all future expenses in connection with operation of Abbott Manor as well as the compensation to which the Estate had been adjudged entitled. (The Estate was granted judgment in the amount of $416,714 plus interest and costs.) The State appealed from the judgment and order.

On appeal to the Appellate Division, it was concluded that the Supreme Court had jurisdiction to determine administrative issues between the Commissioner and the Es-

tate, to appoint receivers and to mandate the continued operation of Abbott Manor, but not to try money claims against the State of New York. The Appellate Division ordered that the Estate be permitted to pursue its money cliams in the Court of Claims despite having failed to comply with the statutory requirements regarding filing of notices of intention. *People v Abbott Manor Nursing Home*, 70 AD2d 434 (4th Dept 1979); affd 52 NY2d 766 (1980).

Three claims were subsequently filed in this Court. Claim No. 63694 was filed November 30, 1979. It sought damages for the actual costs of operating Abbott Manor from February 1, 1976 to October 20, 1976 (a sum of $165,177) on several different theories, including one that requiring the Estate to operate Abbott Manor constituted a partial appropriation of Claimants' property. Claim No. 63695 was also filed November 30, 1979. It alleged a cause of action based on conspiracy for which $1,000,000 in damages was sought. It alleged three additional causes of action, including use of Abbott Manor, its equipment, inventory, and funds without payment therefor, for the period October 20, 1976 to November 30, 1979 and thereafter, a sum calculated as of the date of filing at $833,291.04 plus interest. Finally, Claim No. 65544 was filed July 7, 1981. That claim sought damages in the sum of $314,320 for waste, damage and injury to the property discovered on or about September 19, 1979, when the Commissioner of Health returned physical possession of the property to the Estate. Said damages were alleged to have resulted from the Commissioner's failure to provide his predecessor private coreceivers with sufficient funds to maintain the property during their receivership.

In 1981, Claimants brought motions for partial summary judgment in Claim Nos. 63694 and 63695. In a memorandum decision filed August 25, 1982 this Court concluded with respect to Claim No. 63695, at 75, that the imposition of the receivership constituted a temporary

taking for which the State was obligated to compensate Claimants. The Court found that just compensation under the circumstances included a fair monthly rental of $7,500 for the period October 20, 1976 to September 14, 1979 premised on a net-net lease (a total of $262,500); real estate taxes of $142,365; and insurance charges of $26,861. In addition, certain other expense items chargeable to the receivers for which Claimants sought reimbursement were also ordered to be paid. The Court set a value of $46,094.91 on inventory items owed to the Estate.[3] Finally, several items of damages, including the attorney and accounting fees at issue here, were ordere severed and set down for trial.

With respect to Claim No. 63694, covering the period prior to imposition of the receivership, the Court determined that there existed triable issues of fact and denied the motion for summary judgment, at 54. To date, a trial on those issues of fact has not been held.

The order and judgment were unanimously affirmed by the Appellate Division, Fourth Department, without opinion, January 27, 1984 (99 AD2d 652). The State subsequently moved for leave to appeal. The Court of Appeals dismissed the appeal "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution." 68 NY2d 641 (1986). To date, the judgment has not been paid by reason of the automatic stay granted the State pending appeals.

At the trial subsequently conducted in this Court on the remaining issues in Claim No. 63695, Claimants produced

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[3] The memorandum decision provided the State an opportunity to dispute this figure based upon its own expert appraisal. Subsequently, the parties agreed upon a reduced figure for inventory and moved for a reduction of the judgment by $15,000 plus associated interest. Accordingly, an amended partial summary judgment was issued March 5, 1986 in the amount of $730,565.00 (reduced from $751,178.14).

testimonial and documentary evidence to substantiate their claims for accountant and attorney fees. Claimants have stipulated to a discontinuance of all other unresolved matters set forth in the amended partial summary judgment entered March 5, 1986. It is now Claimants' position that only the accounting and attorney fee issue in Claim No. 63695 prevents our prior memorandum decision from being a final order reviewable by the Court of Appeals.

Initially, Claimants sought attorney and accounting fees in the sum of $190,000. They now seek to amend the ad damnum to increase the amount sought for such fees to $238,000. The Court reserved decision on the motion at trial.

We have accepted Claimants' contention that our determination herein will be viewed as final for purposes of appellate review if all the issues set forth in Claim No. 63695 are resolved; and that Claim Nos. 63694 and 65544 are indeed severable and may be tried at a later date.[4] Accordingly, we will proceed to the questions whether Claimants are entitled to recover their accounting and legal expenses and whether those expenses were fair and reasonable.

It is well established in New York and in nearly all other state jurisdictions (the exception being Florida) that constiutionally required just compensation does not include legal and associated expenses incurred in fixing the value of property taken by eminent domain.[5] Despite

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[4] We cast no blame upon Claimants' current counsel for the tangled state of the proceedings or the fact that the two companion claims are not ready for trial. Claimants' current counsel are laboring heroically under the dead weight of the dispute's tangled procedural history in this Court, as well as rancor and related lawsuits among the beneficiaries and fiduciaries and prior counsel for the Estate.

[5] See generally Searles, *Attorney's Fees in Condemnation Proceedings*, 56 NYSBJ 20 at 21 (April 1984).

the obvious equities of a contrary rule, payment for expert witness and legal fees generally is not awarded except where specifically authorized by statute. *Matter of Brooklyn*, 148 NY 107, 109 (1895); *Matter of Rapid Transit R.R. Commissioners*, 197 NY 81 (1909); *Legislature of County of Monroe v Lubelle*, 94 Misc 2d 413 (Sup Ct Monroe County 1978). Such statutory authorization is both uncommon and narrow in scope where offered.

Reimbursement for reasonable attorney fees is mandated under limited circumstances by EDPL Section 702 (B) and (C). Paragraph (B) requires such reimbursement "(i)n the event that the procedure to acquire such property is abandoned by the condemnor, or a court of competent jurisdiction determines that the condemnor was not legally authorized to acquire property . . . ." Paragraph (C) requires "(i)n the event that a court of competent jurisdiction determines that the condemnor did in fact take property after the condemnor denied that there was any taking of property and made no offer to settle the claim" that reimbursement be made for "actual and necessary costs, disbursements and expenses, including reasonable attorney fees incurred in establishing the de facto taking."[6]

This Court previously found, in our memorandum decision filed August 25, 1982, that the State's insistence upon running Abbott Manor after Claimants' attempt to close it constituted a de facto taking. This put Claimants in the unenviable position of being effectively deprived of their property by the sovereign and deprived of the normal procedural protections of the EDPL sur-

[6] See also EDPL Section 701, which allows payment of up to $10,000 for extraordinary expert witness fee expenses in cases where the court's award is at least two hundred percent of the amount of the condemnor's proof. Such additional award cannot in any case, however, exceed ten percent of the difference between the actual award and the amount of the condemnor's proof.

rounding exercise of the power of eminent domain because there had been no de jure taking. Thus, Claimants had to establish first that a taking had been effected, and second, the value of the property taken. It is just such cases that EDPL Section 702(C) was intended to address.

Not only did the Department of Health deprive Claimants of their property, but throughout a prolonged and difficult series of negotiations, it fought tooth and nail against making any accommodation whatsoever with the Estate. As a result, substantial legal fees were incurred. These were documented at trial and are summarized below.

John J. Phelan, special counsel to the Buffalo law firm of Moot & Sprague,[7] testified that he and his law firm represented the Estate from September 9, 1976 until early 1977. The Moot Sprague file on the case was destroyed, and Mr. Phelan testified from his own recollection and from records possessed by the Estate's current counsel. Moot Sprague's charges were $15,895, of which all was paid but $2,943.39. Mr. Phelan's services were billed at $75 per hour; those of an associate who assisted him at $35 per hour. See Exhibits 11A through 11F. Moot Sprague represented the estate through hearings in December 1976 on the injunction and ceased its representation thereafter because of difficulty it encountered obtaining payment from the Estate.

Norman E. S. Greene of the Buffalo firm of Miller, Farmelo, Cane & Greene, testified that his firm was contacted by Saul Birnbaum (one of the co-executors who was subsequently removed by the Monroe County Surrogate) in late January 1977 and represented the Estate from that time to about March 1980. Exhibits 12A through 12E are copies of the bills for Miller Farmelo's

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[7] Moot & Sprague was previously known as Moot, Sprague, Marcy, Landy, Fernbach & Smythe.

services. These are fully itemized and total $40,362.87. Miller Farmelo's file on the case no longer exists and Mr. Greene testified from memory regarding the nature of his representation.

The Miller Farmelo firm was paid in full for its efforts, which included substantial legal research and representation at periodic hearings. Both Mr. Greene and Mr. Phelan testified that they encountered dogged resistance every step of the way from the Department of Health, including appeal of all rulings in the Estate's favor. Mr. Greene represented the Estate when Justice Kasler's award of $416,714 was appealed to the Fourth Department in September 1979. By that time, however, still another law firm, Stroock & Stroock & Lavan of New York City, had been hired by Saul Birnbaum. The Stroock firm assisted on the Appellate Division brief in 1979 and subsequently took the matter to the Court of Appeals.

The Court received into evidence the transcript of an examination before trial taken February 25, 1986 of Robert Zastrow, a partner in the Stroock firm (Exhibit 19). The Stroock timesheets show a total of 1007.7 hours billed to the Estate for which charges of $143,059 were made plus disbursements of $9,633 for a total bill of $152,692. See Exhibits 2 through 8. This Court is very familiar with the nature of the Stroock firm's efforts as it was that firm that commenced the Court of Claims actions and pursued the motion for summary judgment in Claims Nos. 63694 and 63695. The Court allowed the record to remain open in order to receive into evidence a deposition transcript (Exhibit 22) of Charles G. Moerdler of the Stroock firm attesting that that firm's charges were fair and reasonable, a matter that Mr. Zastrow's testimony had not adequately addressed.

The Court heard testimony from William G. Bauer of the Rochester firm of Woods, Oviatt, Gilman, Sturman &

Clarke, which currently represents the Estate. Mr. Bauer testified that from April 1985 to the date of trial his firm had charged the Estate for 65.7 hours devoted to attempts at enforcement of the Court of Claims judgment and a motion to amend that judgment with respect to the amount charged for inventory items. These fees totaled $7,234.

The Court also received into evidence as Exhibit 20 a transcript of an examination before trial of Sidney Finger, a certified public accountant who had been engaged by the Estate to help establish a value for Abbott Manor and to testify in various legal proceedings in connection therewith. Mr. Finger's services, which were billed at rates of $100 and $150 per hour, led to expenses for the Estate of approximately $10,000. Mr. Finger had also been engaged by Saul Birnbaum in connection with other business affairs, and his time slips relating to Abbott Manor had either been lost or discarded over the years. As a result, the $10,000 figure for billings related to Abbott Manor was Mr. Finger's best estimate.

Finally, the Court heard testimony from Percival D. Oviatt, Jr., Claimant's current counsel. Mr. Oviatt estimated that an additional $12,000 would be billed for his firm's future efforts on Claim No. 63695. He also testified that the Monroe County Surrogate, who has jurisdiction over the Estate, had thus far awarded $490,000 to the Stroock firm for its services and that the previous co-executors, Saul and Janice Birnbaum, had paid Stroock about $347,000 during the course of Stroock's representation.[8]

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[8] The Abbott Manor litigation is only a small part of the Estate's involved legal activities. Hence, the amounts paid to Stroock are far greater than the amount claimed herein in connection with the Abbott Manor controversy. Moreover, the amounts paid or ordered to be paid by the Surrogate were not earmarked for specific services.

The Court has heard the State's arguments to the effect (1) that EDPL 702(C) does not provide authority for the award sought herein; and (2) that the Supreme Court is the appropriate forum for this application because most of the fees charged were incurred for matters handled in that Court.

We reject the latter argument outright. The Appellate Division decision published at 70 AD2d 434, which was discussed above, makes it clear that Claimants must look to this Court for resolution of their money claims against the State. Further buttressing this conclusion is EDPL Section 501, which provides in pertinent part, "The court of claims shall have exclusive jurisdiction to hear and determine all claims arising from the acquisition of real property by or in the name of the people of the state of New York . . . ."

More troubling to our determination, however, is Court of Claims Act Section 27 which provides:

> "Except as provided in section 701 of the eminent domain procedure law and sections 3126 and 4545 of the civil practice law and rules, costs, witnesses' fees and disbursements shall not be taxed, nor shall counsel or attorney's fees be allowed by the court to any party."

In its original incarnation, Section 27 contained no exceptions and simply forbade payment of counsel fees and other costs of litigation. It was amended (effective July 1, 1978) after enactment of the Eminent Domain Procedure Law, to provide the exception for expenses awarded under EDPL Section 701 (L 1978, ch 727, Section 1). Further amendments expanded the exceptions to include costs awarded under CPLR 3126 and 4545 (L 1984, ch 183, Section 1; L 1986, ch 220, Section 37).

Prior to the enactment of the EDPL, judicial decisions varied in their treatment of litigation costs in certain

condemnation proceedings. *Terrace Hotel Co. v State of New York*, 19 NY2d 526 (1967), for example, concluded that the general prohibition of Section 27 was *not* "designed to prohibit the award of legal expenses and counsel fees by the court upon discontinuance of eminent domain proceedings by the State. The discretionary power of the courts to make such awards exists at common law . . . and it has consistently received legislative sanction. . . ." 19 NY2d at 531-532 (citations omitted) Consequently, the case was remanded to the Court of Claims to exercise its discretion in deciding whether an award of legal fees and expenses was warranted.

Subsequently, in *Keystone Associates v. State of New York*, 82 Misc 2d 620 (1975), the Court of Claims followed the reasoning of *Terrace Hotel, supra*, in awarding legal expenses for what the Court characterized as "a discontinuance of a temporary taking because of lack of valid authorization for such taking." 82 Misc 2d at 628. In *Keystone*, the temporary taking had also been determined to be a de facto taking resulting from an eight month delay in issuance of a demolition permit for the old Metropolitan Opera House in New York City. Claimants were lessees whose lease called for demolition of the Old Met and construction and leasing of an office building on the site. On appeal, however, the decision was reversed and the Third Department, focusing sharply on the de facto nature of the taking, found that the case was distinguishable from *Terrace Hotel*. 55 AD2d 85 (1976).[9] The Court implied that litigation expenses incurred in establishing the unconstitutionality of chapter 691 of the Laws of 1966, which had authorized withholding the demolition permit, might be compensable under the reasoning in *Terrace Hotel*. If further found, however, that these expenses were inseparable from those

[9] The Appellate Division decision was subsequently reversed and remitted to the Court of Claims for a new trial on the issue of proper computation of fair rental value. 45 NY2d 894 (1978).

incurred in establishing the amount of Claimants' compensation, and relied upon Section 27 of the Court of Claims Act to deny reimbursement of legal expenses.

At present, we view the state of the law on this issue as uncertain. EDPL Section 702, paragraphs (B) and (C) address the fact situations presented in *Terrace Hotel* (B) and in *Keystone Associates* (C) and treat both the same, i.e. provide for award of attorney fees and other expenses. We conclude, accordingly, that Section 702 legislatively overrules the result reached by the Third Department in *Keystone Associates* to the extent that that decision would deny payment of expenses incurred in establishing an unauthorized taking simply because they were intertwined with expenses incurred to establish the value of a de facto taking.

The amendment of Court of Claims Act Section 27 to recognize awards under EDPL Section 701 and the amendment's silence with respect to Section 702 logically tend to indicate that expenses awarded pursuant to Section 702 cannot be collected from the State of New York. In examining Section 27 in light of the EDPL as a whole, however, this Court is led to just the opposite conclusion.

The purpose of the EDPL is stated to be "to provide the exclusive procedure by which property shall be acquired by exercise of the power of eminent domain in New York state." EDPL Section 101. A condemnor referred to in the EDPL is "any entity vested with the power of eminent domain." EPDL Section 103(D). Section 104 provides that the law "shall be uniformly applied to any and all acquisitions by eminent domain of real property within the state of New York." EDPL Section 501 distinguishes between condemnation proceedings begun by the State, over which the Court of Claims has jurisdiction, and all other condemnation proceedings, over which Supreme Court has jurisdiction.[10] This general

[10] Except for any other proceedings over which the Court of Claims has specifically been conferred with jurisdiction by statute.

distinction between Supreme Court and Court of Claims jurisdiction is observed in several other provisions of the law, viz. Sections 402, 403, 502, 503, 506, 507, 508 and 511. Significantly, Sections 701 and 702 make no distinction between the two classes of proceedings with respect to awards of expert witness' fees, attorney fees and other costs. The logical import of these provisions, clearly, is that both were intended to apply equally to condemnation proceedings irrespective of whether jurisdiction over such proceedings lay in the Court of Claims or in Supreme Court. Finally, EDPL Section 705 provides as follows:

> "Notwithstanding any inconsistent provisions of law, general or special, the provisions of this law shall be controlling and on and after the effective date of this law, any interest in real property subject to acquisition shall be acquired pursuant to the provisions of this law."

We conclude that reading Court of Claims Act Section 27 to prohibit the award of expenses described in EDPL Section 702 is utterly inconsistent with the purposes and overall scheme of the Eminent Domain Procedure Law and is incorrect. We further find *Terrace Hotel Co. v State of New York, supra,* to provide authority for the award of accounting and legal fees in this claim.

We find the amounts charged for legal and accounting services in connection with establishing the Estate's right to recover from the State of New York for a de facto appropriation of the Abbott Manor Nursing Home to be in all respects fair and reasonable.

Pursuant to CPLR 5001(a), Claimants are entitled to prejudgment interest because this award arises from the State's act depriving them of possession and enjoyment of their property. In such cases, "[i]nterest shall be computed from the earliest ascertainable date the cause of action existed, except that interest upon damages

incurred thereafter shall be computed from the date incurred. Where such damages were incurred at various times, interest shall be computed upon each item from the date it was incurred or upon all of the damages from a single reasonable intermediate date." CPLR 5001(b). This general rule is, of course, subject to the limitation placed upon claims against the State by Court of Claims Act Section 19(1) and EDPL Section 514(B), prohibiting payment of interest for the period six months subsequent to the accrual of a claim until the actual filing of the claim in those cases where claimants fail to file within six months of the date of accrual.

In *Terrace Hotel Co. v State of New York*, 31 AD2d 860 (3d Dept 1969) the Appellate Division concluded that claimant was entitled to interest on an award of attorney fees under CPLR 5001(b) from "the earliest ascertainable date the cause of action existed." That date was determined to be the date upon which the State's motion to discontinue its appropriation proceeding was granted. The discontinuance had resulted from a Court of Appeals decision in another case, *Schulman v People*, 10 NY2d 249 (1961) determining that Section 30 of the Highway Law supplied no authority for condemnation of a negative easement.

The instant claim, however, presents a different situation. It was not until this Court's memorandum decision of August 25, 1982 that Claimants received any judicial recognition that a de facto appropriation had in fact occurred. The State, as mentioned above, appealed that decision and upon receiving an unfavorable result from the Appellate Division sought to appeal to the Court of Appeals. Presumably when a final order is entered herein the State will again seek review by the Court of Appeals. We emphasize this point because we view all the legal expenses incurred by the Estate as incurred for the purpose of establishing a de facto taking.

In *Terrace Hotel*, all the legal expenses had been incurred prior to the time the cause of action was found

to have arisen, and none were contemplated thereafter because the State had voluntarily discontinued its proceedings. Here, however, there was no abandonment of a de jure proceeding. Rather, Claimants were de facto deprived of their property effective September 5, 1976 [11] and thereafter incurred legal and associated expenses to obtain judicial recognition that such a de facto taking had occurred. Hence, the legal expenses were incurred after the claim's accrual.

In a direct action by an attorney for fees, interest would normally be computed from the date of demand for payment unless such demand predated the completion of services. In the latter case, interest would be computed from the date the attorney's services terminated. 5 Weinstein-Korn-Miller, NY Civ Prac par 5001.10: *Neimark v Martin*, 7 AD2d 934 (2d Dept 1959); *Brent v Keesler*, 32 AD2d 804 (2d Dept 1969). In this case, however, we are dealing with an action by a client to recover attorney fees already paid or incurred. Accordingly, we conclude that it is the date upon which the Estate rendered payment that governs with respect to computation of interest, rather than the date on which the services were completed or billed.

We view the appropriate dates for computation of interest to be those dates upon which payment was made by the Estate for the services rendered, or as near thereto as the Court can ascertain from the record.[12] As

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[11] This finding is not intended to decide Claim No. 63694 mentioned above.

[12] Because of the difficulty of ascertaining when certain of the payments were made, and the continuing need for legal representation, this claim also lends itself to computation of interest from a single reasonable intermediate date pursuant to CPLR 5001(b). We recognize the lack of precision in our choice to compute interest from dates of payment for services and view the selection of a single date as equally appropriate. Nevertheless, we attempt to be as precise here as the record permits in establishing interest computation dates.

noted above, the Moot Sprague and Miller Farmello firms' files were destroyed; Mr. Finger has never been paid for his services; Moot Sprague was not paid in full; Woods Oviatt has been paid for past services but will clearly provide more services in the future; and Stroock has been paid at least $490,000 on account by order of the Monroe County Surrogate without earmarking (Exhibits 16, 17, 18). We believe the following schedule most fairly compensates Claimants for attorney and accountant fees incurred and to be incurred in this matter. Pursuant to Court of Claims Act, Section 19(1) and EDPL Section 514(B), all items paid more than six months prior to the filing of Claim No. 63695 (November 30, 1979) are to bear interest from that date in addition to the period set forth below.

Moot Sprague	$5,000.00 from 9/9/76 to 3/9/77
	*3,270.00 from 11/1/76 to 5/1/77
	4,677.34 from 12/6/76 to 6/6/77
	**2,943.39 from date of decision
Miller Farmello	*$3,846.40 from 4/1/77 to 10/1/77
	*4,494.40 from 7/1/77 to 1/1/78
	4,000.00 from 4/12/78 to 10/12/78
	4,365.95 from 6/12/78 to 12/12/78
	13,159.85 from 2/5/79 to 9/5/79
	5,941.29 from 8/14/80
	*4,555.00 from 9/14/80
Sidney Finger	**$10,000.00 from date of decision
Woods Oviatt	***$7,246.00 from 6/25/86 (date of trial)
	**12,000.00 from date of decision
Stroock & Stroock & Lavan	+$100,000.00 from 5/5/83
	++52,692.00 from 12/29/83
TOTAL	$238,191.62

* Claimants were unable to establish the precise dates on which these payments were made, but did establish that they were made in a timely fashion. The Court has selected arbitrary dates shortly following the billing dates, or, in the Moot Sprague case, extrapolating from Mr. Phelan's testimony.

** Items unpaid or to be incurred in the future.

*** The proof at trial did not establish when Woods Oviatt had been paid. Accordingly, we have chosen the date of trial as an appropriate point for computing interest.

+ Date of Monroe County Surrogate order awarding $100,000 in unearmarked legal fees to the Stroock firm (Exhibit 16).

++ Date of Monroe County Surrogate order awarding an additional $190,000 in unearmarked legal fees to the Stroock firm (Exhibit 17).

We recognize that the statute is directed at compensation for legal expenses incurred incident to establishing the existence of a de facto taking and not at the expense of establishing the value of the property taken. See Comment of State Commission on Eminent Domain to Sec. 702 in 1974 Report, p. 58. The nature of this claim, however, and the complex issues connected with it make it virtually impossible for the Court to separate out the "de facto" expenses from the "valuation" expenses. The greatest part of the expense incurred was clearly directed at obtaining judicial recognition in some form of a *right* to payment. Moreover, the expense of ascertaining the costs of running Abbott Manor was necessary to establish to judicial satisfaction that the State's interference with Abbott Manor rose to the level of a deprivation of property. Had the State's interference been less pervasive or had it negotiated an interim level of Medicaid reimbursement acceptable to Claimants, the receivership might not have been viewed as confiscatory in nature. We conclude that Claimants are entitled to the full amount of legal and accounting fees sought.

Claimants' motion to increase the ad damnum for attorney fees is hereby GRANTED.[13] See *Loomis v Civetta Corinno Construction Corp.*, 54 NY2d 18 (1981). Claimants are hereby awarded the additional sum of $238,191.62 with statutory interest thereon as set forth

[13] The Court has *sua sponte* granted an additional increase of $192.00 to conform to the proof.

above. The Clerk of the Court is hereby directed to amend the amended partial summary judgment previously entered in this claim to reflect: (1) the award of $238,191.62 for accountant and attorney fees with statutory interest thereon as set out above, and (2) Claimants' discontinuance or abandonment of all other items left open in the judgment entered March 5, 1986.[14] The Clerk of the Court is also directed to delete the term "partial" from the judgment's caption as said judgment now disposes of all items raised in Claim No. 63695.

This constitutes the decision of the Court pursuant to CPLR 4213(b).

LET JUDGMENT BE ENTERED ACCORDINGLY.

DATED: Buffalo, New York,
October 2, 1987.

/s/ Thomas P. McMahon
THOMAS P. MCMAHON
Judge of the Court of Claims

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[14] We understand this discontinuance or abandonment to encompass the following:

(1) the amount of damages sustained on the first cause of action from and after September 14, 1979, with the exception of accounting and legal services (Par. 14 [E]);

(2) the claims pleaded in subdivisions D(3) and D(7) of paragraph 14; and

(3) the fourth cause of action.

[ATTACHMENT]

BIRNBAUM ESTATE—
ABBOTT MANOR NURSING HOME

State Court Action re Reimbursement For State's de facto taking

(People of State of New York v. Abbott Manor Nursing Home)

(Birnbaum et al. v. State of New York)

CHRONOLOGICAL OUTLINE OF LEGAL PROCEEDINGS

2/13/76	Bernard Birnbaum's death.
4/18/76	Saul and Janice Birnbaum appointed executors and co-trustees.
2/27/76-9/5/76	Conferences with DOH et al. (3/9, 4/7, 5/26, 8/10 and 8/20/76) with respect to closing Abbott Manor, appointment of consensual receiver, Medicaid reimbursement rates, losses incurred by Abbott Manor in connection with operation of Home, Estate's desire to close Abbott Manor, finding other facilities for Medicaid patients, etc. (C 21-30, 265-286).
9/03/76	Estate notifies Abbott Manor patients that it is closing 8/31/76 and that they will have to find other care facilities by reason of DOH failure to respond to Estate's request regarding increased Medicaid reimbursement.

"A" page references are to Court of Appeals Record in State Court action.

"C" page references are to Appellate Division Record in Court of Claims appeal.

9/05/76	DOH commences action to enjoin closing in Supreme Court, Erie County, and obtains Order to Show Cause containing TRO enjoining closing (A 44-62)
9/15/76	Estate files Answer requesting appointment of receiver and compensation for Medicaid cost overruns (A 66). Affidavits of Phalen, Florea, Solomon, Finger and financial statements re Abbott Manor's Medicaid shortfall 2/1/76-8/31/76 (A 78-108)
9/16/76	Hearing on Show Cause Order for preliminary injunction.
11/04/76	Order appointing Skokowski and Galluch co-receivers nunc pro tunc 10/20/76 (A 108).
11/10/76	Meeting to settle Court's Order re appointment of co-receivers and hearing to determine amount of Estate's reimbursement for fair rental value, etc.
11/23/76	Supplemental Order granting Estate a hearing on its claim for fair monthly rental and value of assets delivered to receivers if DOH does not face and determine such sums within 90 days; State's Motion for injunction denied (A 112).
12/01/76	Meeting of representatives of DOH, Estate and co-receivers—State makes an adverse determination on co-receivers' claim to recover costs of operation.
12/13/76	Motion to compel State to reimburse receivers for actual costs; Motion to compel receivers to account for Estate assets used in Abbott Manor since 10/20/76—fair rental value of physical plant, inventory, etc. (A 125; C 34).
12/15/76	Hearing on Motion to establish value of assets turned over to State—fair rental value and other costs paid by Estate (C 35; A 140-523).

12/16/76	Hearing continued.
12/22/76	Hearing continued.
12/29/76	Order on 12/13/76 Motion requiring State to pay receivers weekly sufficient sums to cover receivers' actual costs (C 295; A 701) [State subsequently appealed and obtained automatic stay of Order; appeal dismissed 11/2/79 (C 45, 308)]
2/77	Miller, Farmelo, Cane & Greene substituted as attorneys for Moot, Sprague.
2/28/77	Hearing on 12/13/76 Motion to establish value of assets turned over to State receivers continued;—State presents its evidence (A 523-690); decision reserved.
6/30/77	Decision (subsequently rescinded and substituted by 3/6/78 Decision) regarding Estate's right to fair rental value and reimbursement for other costs and expenses from State. (A 27; C 296)
10/07/77	8-page letter from Estate to Kasler re 6/30/77 Decision requesting argument of items on which Estate had the right to reimbursement setting forth various items contended for.
1/10/78	90-day notice of closure of Home issued by receivers at direction of Kasler because of State's failure to pay sufficient sums to cover receivers' costs of operation. (C 296)
1/12/78	Hearing in connection with the Estate's 10/7/77 letter to argue Court's 6/30/77 Decision re reimbursement awarded to Estate under that Decision to increase amount of award (A 604; C 296-297). Decision reserved (A 690).

1/20/78	Order to Show Cause to dismiss State's appeal from 12/29/76 Order or, in the alternative, to cancel automatic stay requiring State to pay receivers' actual costs (A 691-729).—Stay cancelled (A 728; C 300-301).
3/06/78	Decision re Estate's rights to reimbursement for fair rental, money advanced and other items, which Decision replaced the Court's 6/30/77 Decision (A 32) (see 10/7/77 and 1/12/78 notations above).
4/11/78	Order to Show Cause to add parties to permit transfer of funds to cover co-receivers' costs (A 730).
4/11/78	Order to Show Cause to extend receivership (A 751); State objects (A 762; C 302).
4/20/78	Hearing on Show Cause Order to extend receivership because of impossibility of closing Home pursuant to 1/10/78 Order. Basis of extension—no place to relocate patients;—contested by State (C 304-305).
5/08/78	Order terminating receivership of Skokowski and Galluch; Whelan, Commissioner of DOH, appointed receiver—responsible for all future expenses of Home and all expenses of receivership just terminated, including fair monthly rental as determined by Court on 3/6/78; monies advanced to receivers by Estate—$48,094.91 representing inventory value; 19/31 of Medicaid and other monies received for month of 10/76; insurance premiums paid by Estate; interest on expense on loans of monies advanced by Estate to receivers; all other expenses of receivers. State appealed insofar as it ordered Commissioner to take responsibility for expenses (C 306).

5/25/78	Order reducing 3/6/78 Memorandum Decision to judgment—fair rental value put at $106,400.00 per year, etc. (A 922; C 307).—State appeals.
6/02/78	State appeals from 5/8/78 Order (C 306).
6/20/78	State appeals from 5/25/78 Order awarding judgment for fair rental value, etc. and stays enforcement of judgment;—Notice of Appeal covers all items awarded Estate by 5/25/78 Order (A 11; C 307).
7/21/78	Final judgment entered for Estate (A 22-25).
8/11/78	Estate appeals from 7/21/78 Judgment (C 307).
12/20/78	Estate's Motion to enjoin State's closing of Home (C 166).
8/16/79	Abbott Manor vacated.
9/12/79	Order relieving State from any responsibility for continued possession or maintenance (C 180).
11/02/79	Appellate Division, Fourth Department, modifies 5/25/78 Order and 7/21/78 Judgment by deleting from award any amounts other than patients' allowances (C 307-308; A 1057);—affirms 5/8/78 Order terminating Skikowski and Galluch as receivers and appointing Whelan receiver with responsibility to pay costs and expenses; dismisses appeal from 12/29/76 Order.
11/29/79	Estate files Notice of Appeal from Appellate Division Order cancelling awards for reimbursement for fair rentals, etc. (C 309; A 1055).
11/30/79	Estate files Claim #63695 covering reimbursement for State's de facto taking from 10/20/76-9/19/79 (C 309).

1/07/80	State moves to resettle Order re Estate's right to reimbursement and State's liability to pay the $29,849.00 in Medicaid payments which were paid to receivers of Abbott Manor for the period 10/1/76-10/20/76 (A 1071-1075; C 310) and also to limit collectibility of final judgment of $416,714.00 awarded Estate on Kasler's 5/25/78 Order, to limit satisfaction of Judgment from assets remaining in the hands of the Commissioner, as receiver of Abbott Manor, and to deny satisfaction from State Treasury in general, or, in the alternative, for permission to appeal to the Court of Appeals.
1/07/80	State moves to resettle Appellate Division Order affirming 5/8/78 Order of Supreme Court to provide that reimbursement of the Estate's award as set forth in the Order be limited to assets in the Commissioner's hands as receiver of Abbott Manor (C 310; A 1104, 1106-1111); claiming that Estate is liable for costs of receivers' operation of Home and for receivers' attorneys fees and that the collectibility of the Estate's award is limited to the assets in the Commissioner's hands; or, in the alternative, Estate asks permission to appeal to the Court of Appeals.
1/15/80	Moerdler's Affidavit in opposition to Motion to resettle (A 1124-1133).
1/18/80	State's Reply Affidavits in support of Motion to resettle (A 1141).
2/08/80	Motions to resettle Appellate Division Decisions denied (C 310; A 1210-1212).
12/18/80	Court of Appeals affirms Appellate Division Order.

COURT OF CLAIMS PROCEEDINGS

11/30/79	Claim # 63695 filed (C 64).
4/07/81	Estate's Motion for Partial Summary Judgment:
	Affidavit of Birnbaum in support (C 15-63). Exhibits A-M in support, including Record on Appeal in State Court action (C 64-125).
4/07/81	Finger Affidavit in support and Schedules (C 126-130).
6/18/81	Kutzuba Affidavit in opposition (C 131-144).—Grounds of opposition: action should be in Supreme Court as an Article 78 Proceeding; claims fails to state a cause of action; receivers' expenses are chargeable to Estate pursuant to CPLR § 8004(b) to the extent they are not covered by Medicaid reimbursements; damages limited to operating deficit; State's action not proximate cause of claimant's damages, etc.
5/27/81	Janiski's Affidavit in opposition (C 145); State simply exercising its police power; no de facto taking.
5/27/81	Chase Affidavit in opposition (C 156).
7/14/81	Reply Affidavits of Birnbaum, Solomon and Moerdler in support of Motion for Partial Summary Judgment (C 189).
7/24/81	Reply Affidavits in opposition of Cicero (C 252) and Wall (C 261).
8/13/82	Judge McMahon's Decision (C 264).
1/20/83	Order and Judgment for $541,774.91 (C 6).
2/10/83	State Notice of Appeal (C 3).
1/27/84	Appellate Division affirms.

7/03/84	State's application for leave to appeal to Court of Appeals denied.
2/19/86	Estate's Motion to amend Court of Claims' Judgment to allow for value of inventory returned to Estate
3/05/86	Amended Judgment entered in Court of Claims Clerk's Office
4/02/86	State appeals from Intermediate Order of Appellate Division entered 1/27/84 affirming Court of Claims' Judgment
6/05/86	Court of Appeals dismisses State's appeal on the ground that the Order and Judgment appealed from do not finally determine the action within the meaning of the Constitution

APPENDIX E

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifth day of June A.D. 1986

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

Mo. No. 585 SSD 70

JANICE BIRNBAUM, *et al.*,
Respondents,

vs.

THE STATE OF NEW YORK,
Appellant.

The appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that the judgment appealed from does not finally determine the action within the meaning of the Constitution (*Sontag vs. Sontag*, 66 NY2d 554).

Judge Hancock took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX F

SUPREME COURT
STATE OF NEW YORK
Appellate Division
Fourth Department

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v

ABBOTT MANOR NURSING HOME *et al.*,
Respondents.

June 4, 1985

Order unanimously modified, on the law, to reduce the coreceivers' allowance of $74,910.40, and, as modified, affirmed, without costs. Memorandum: In a previous judicial proceeding it has been determined as law of the case that the appointment of coreceivers Galluch and Skokowski was properly made by Supreme Court pursuant to Public Health Law § 2810 (*see, People v Abbott Manor Nursing Home*, 70 AD2d 434, 438, 439, *affd* 52 NY2d 766); the State is therefore precluded from relitigating that issue (*see, Martin v City of Cohoes*, 37 NY2d 162, 165). Another related proceeding resulted in determinations that the receivership was imposed by the court as a remedial device "to respond to the State's insistence that the Abbott Manor Nursing Home remain operative" and "as the means to force the continued operation" of the home and that such imposition of the receivership constituted a temporary taking by the State (*Birnbaum v*

State of New York, 99 AD2d 652 [unanimously affg order and judgment of Court of Claims for reasons stated in mem thereat], *lv dismissed* 63 NY2d 675). The application of the doctrine of collateral estoppel precludes relitigation of those issues (*see, Schwartz v Public Administrator of County of Bronx*, 24 NY2d 65, 72). Accordingly, we affirm the determinations implicit in the order of Supreme Court and the summary judgment of the Court of Claims that the State is the party responsible for the appointment of the coreceivers and the party liable for the payment of their commissions and the fees of the attorney for the receivership. We find, however, that Supreme Court erred in allowing commissions under CPLR 8004 in an amount equal to the aggregate of 5% of the sums received and 5% of the sums disbursed. We reduce the amount to 5% of the total receipts or $74,910.40 (*see, City of New York v Big Six Towers*, 59 Misc 2d 839, 842, *affd* 33 AD2d 658; *Cornell Assoc. v Euston Props. Corp.*, 50 Misc 2d 813, 815; *New York Bank for Sav. v Jamaica Towers W. Assoc.*, 49 Misc 2d 230, 232; *Bowery Sav. Bank v 566 Amsterdam Ave. Corp.*, 32 Misc 2d 459, 460). Even if we were to apply the contrary rule adopted by Supreme Court (*see, Sunrise Fed. Sav. & Loan Assn. v West Park Ave. Corp.*, 47 Misc 2d 940) we would, in the exercise of our discretion, reduce the commissions to the above amount, considering that the coreceivers are being compensated by the payment of their salaries and that a large percentage of the receipts of the nursing home are Medicaid payments made by the State. We find no reason to disturb the amount fixed for attorney's fees. (Appeal from order of Supreme Court, Erie County, Kasler, J.—receiver's commissions, attorney's fees.) Present—Hancock, Jr., J. P., Callahan, Denman, O'Donnell and Pine, JJ.

APPENDIX G

STATE OF NEW YORK
COURT OF APPEALS

MATTER OF BIRNBAUM

v.

BIRNBAUM

(4th Dept: 101 AD2d 710)

July 3, 1984

Motion for leave to appeal dismissed.

APPENDIX H

STATE OF NEW YORK
COURT OF APPEALS

BIRNBAUM

v.

STATE OF NEW YORK

(4th Dept: 99 AD2d 652)

July 3, 1984

Motion for leave to appeal dismissed.

APPENDIX I

SUPREME COURT OF THE
STATE OF NEW YORK
Appellate Division
Fourth Judicial Department

Claim No. 63695

PRESENT: DILLON, P.J., CALLAHAN, DOERR, DENMAN, MOULE, JJ.

JANICE BIRNBAUM and SAUL BIRNBAUM, as Co-Executors of the Estate of BERNARD P. BIRNBAUM, Deceased,
Respondents,

v

THE STATE OF NEW YORK,
Appellant.

The above named State of New York having appealed to this Court from an order and a judgment of the Court of Claims entered in the office of the Clerk of said court on January 24 and February 3, 1983, respectively and said appeal having been argued by Clifford Royael of counsel for appellant, Charles Moerdler of counsel for respondents, and due deliberation having been had thereon,

It is hereby ORDERED, That the order and judgment so appealed from be and the same hereby are unanimously affirmed with costs, for reasons stated in the memorandum decision at the Court of Claims, McMahon, J.

Entered: Jan. 27, 1984

CARMEN S. LEONE
Clerk

SUPREME COURT
APPELLATE DIVISION,
Fourth Judicial Department
Clerk's Office, Rochester, N.Y.

I, CARMEN S. LEONE, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that this is a true copy of the original order, now on file in this office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court at the City of Rochester, New York, this Jan. 27, 1984.

[SEAL]

/s/ Carmen S. Leone
Clerk

APPENDIX J

STATE OF NEW YORK
COURT OF CLAIMS

Claim Numbers: 63694 and 63695

Motion Numbers: M-25405 and M-25264

JANICE BIRNBAUM and SAUL BIRNBAUM, as Co-Executors of the Estate of BERNARD P. BIRNBAUM, Deceased,
Claimants

-vs-

THE STATE OF NEW YORK,
Defendant

MEMORANDUM DECISION

[Dated August 23, 1982]

APPEARANCES:

For the Claimants:

CHAMBERLAIN, D'AMANDA, BAUMAN, CHATMAN & OPPENHEIMER
1100 Crossroads Office Building
Rochester, New York 14614

By: ROBERT OPPENHEIMER, ESQ. of Counsel

-and-

STROOCK & STROOCK & LAVAN
61 Broadway
New York, New York 10006

By: CHARLES G. MOERDLER, ESQ.
BURTON N. LIPSHIE, ESQ.
JOHN BERRINGER, ESQ. of Counsel

For the Defendant:
HON. ROBERT ABRAMS, Attorney-General

By: ROBERT H. KUTZUBA, ESQ.
Assistant Attorney-General, of Counsel

McMAHON, J.

The Court has before it motions for summary judgment in companion claims against the State of New York brought by Janice Birnbaum and Saul Birnbaum as co-executors of the Estate of Bernard P. Birnbaum, deceased, (hereinafter referred to as "Claimants" and variously known as "Executors" or "Estate"). The claims have a common origin and possess sufficient other commonalities and relationships to warrant in the interest of brevity and clarity, forlorn though that prospect be,[1] a recitation of their common chronology.

Bernard P. Birnbaum, prior to his death on February 13, 1976, was licensed by the New York State Department of Health pursuant to the provisions of Article 28 of the Public Health Law of the State of New York[2] to operate as a profit-making enterprise, the Abbott Manor Nursing Home located at 505 Abbott Road in the City of Buffalo, County of Erie and State of New York.

Motion No. M-25405 seeks partial summary judgment on the issue of liability only in the Fourth and Fifth Causes of Action in Claim 63694, which allege that although the executors had been notified by the department that ". . . the facility no longer has a legally established operator . . ."[3] from which they concluded that

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[1] See Affidavits and Briefs submitted in support of and in opposition to Motions for Summary Judgment.

[2] 44 McKinney's Cons Laws, Sections 2800 to 2813.

[3] R—The reference is to the pagination of the Record on Appeal (made an Exhibit herein) in the Court of Appeals in the case of

therefore their ". . . duty and authority . . . to operate . . . the Abbott Manor Nursing Home, ceased,"[4] that nonetheless, ". . . at the request and direction of the Department of Health, the Claimants continued to operate the Abbott Manor Nursing Home to protect the health, welfare and safety of its patients";[5] to the consequent monetary damage of the Estate.

The Fourth Cause of Action in Claim 63694 is a claim that the actions of the Department of Health of the State of New York (hereinafter the "Department") in requesting and directing the Claimants to continue the operation of the Abbott Manor Nursing Home (hereinafter "Nursing Home")[6] constituted ". . . a partial appropriation",[7] all to Claimants' damage.

The Fifth Cause of Action in Claim 63694 contains allegations that the Claimants had been assured that they would be reimbursed for all costs incurred in the "operation" of the home;[8] that such representations were false and untrue and were made with the intent of deceiving and defrauding the Claimants, who relied thereon to their financial detriment[9] by continuing the operation of the Nursing Home.

In Motion M-25264 Claimants seek partial summary judgment on the first cause of action set forth in Claim No. 63695 in the sum of $542,751.16, plus interest at six per cent, together with other relief. The first cause

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People of the State of New York, Respondent, vs Abbott Manor Nursing Home, et al., Appellants, 52NY2d 766 which affirmed the Order of the Appellate Division in 70 AD2d 434.

[4] Claim, par 5.

[5] *Ibid*, par 7.

[6] *Ibid*, par 24.

[7] *Ibid*, par 24.

[8] *Ibid*, par 27.

[9] *Ibid*, par 27-29.

of action in Claim No. 63695 repeats the basic allegations set forth in Claim No. 63694, viz.; that the licensed owner of the premises died, effecting an automatic termination of the Home's operating license and being neither licensed nor licensable, and because the continued operation of the Home entailed staggering losses inconsistent with their fiduciary obligations to the Estate, the Executors over a period of seven (7) months, sought to discontinue such operations. It is alleged that the State would not permit them to discontinue operations, and sought and obtained injunctive relief from the Supreme Court to enforce its will that the Home continue to operate, which resulted in successive receiverships. The Order of the Supreme Court dated May 8, 1978, appointing Robert P. Whalen as Commissioner of the New York State Department of Health as receiver and the terms of that receivership [10] as well as the course that Order took through the Appellate Division, are asserted to establish that Order as final and binding on the parties, leaving to this Court only the formal duty of placing its imprimatur on the damages as determined in the Supreme Court litigation.

The detailed chronological recitation of the source and course of the dispute which brings these claims to this Court will, we trust, illuminate and clarify the factual and legal premises of the claims; confine any further evidentiary inquiry to precise issues of fact; and serve as a format for this Court's deliberation and disposition of the cases.

1. As previously noted, Bernard P. Birnbaum, prior to his death on February 13, 1976 had been licensed by the New York State Department of Health to operate the Abbott Manor Nursing Home located at 505 Abbott Road in the City of Buffalo, County of Erie and State of New York, as a profit-making enterprise (R-48).

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[10] R-920 (the Order of May 8, 1978).

2. On or about February 14, 1976 Saul Birnbaum, the co-executor of the Estate of Bernard P. Birnbaum and a Claimant here, notified the State of Bernard P. Birnbaum's demise.

3. Saul Birnbaum and Janice Birnbaum were appointed co-executors [11] of the Will of Bernard P. Birnbaum by order of the Surrogates Court of the State of New York, Monroe County, dated the 26th day of April, 1976. They had neither testimentary authority nor Surrogate's permission to conduct the business of the Nursing Home.[12]

4. On February 27, 1976 Dr. LaVerne E. Campbell, Regional Health Director of the Department of Health, wrote to Executor Birnbaum stating: [13]

> "Due to the recent death of your brother who was the sole proprietor the Abbott Manor Nursing Home, the facility no longer has a legally established operator. By means of this letter, you, as the Executor of the Estate of Bernard P. Birnbaum, are being put on notice that any change or transfer of ownership must first be approved by the State Public Health Council."

Application forms and instructions were sent for any such "successor operator" together with the "applicable rules" of the Public Health Council. The letter continued:

> "If termination of the operation of the facility as a health facility is being considered, I need to be notified as soon as possible and procedures for closing the nursing home will be sent to you.
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> "Within the next week I wish to be notified in writing of the interim arrangements for the operation of

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[11] The brother and surviving spouse, respectively, of the deceased.

[12] 70 AD2d at 436.

[13] Annexed hereto as Exhibit *A*.

the facility—i.e., who is now responsible for the operation of the facility. Thus the Department will know to whom all correspondence is to be directed for legal purposes."

5. There appears to be no dispute that at all of the relevant times embraced by these claims and motions there were approximately 84 patients in the Nursing Home, seventy percent (70%) of whom were receiving public assistance in the form of Medicaid, with the remaining patients covered by insurance or private funds.[14]

6. And there can be no dispute that at all of the relevant times, there were no alternate Nursing Home facilities available in which to place these patients.[15]

7. Claimants allege that the Estate not only lacked a license as an operator of a Nursing Home, but that ". . . it could not be licensed as a matter of law", citing 10 NYCRR, §§ 600.10; 701.2(b); and 401.3(c); and that it was losing significant sums of money in the order of twenty to thirty thousand dollars ($20,000 to $30,000) per month in the operation of the Nursing Home.[16]

8. The State takes the following positions, *inter alia*:

(A) That the "Estate was apprised by the February 27, 1976 letter of Dr. LaVerne Campbell, of the necessity of finding a new operator who could be established as an operator by the Public Health Council to permanently run the facility." [17]

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[14] R-50, 129, 423, 694.

[15] R-63, 64, pars. Sixth, Ninth; R-54, par 9; R-133, 136, 137; 419-421, 484-485; 675-676; 755; 762.

[16] The State agrees that the Home was operating at a loss, though apparently not in the amounts claimed. Brief in Opposition, pp. 31, 34; and see R-479, l 5.

[17] Jasinski affidavit in opposition, par 4.

(B) That Dr. Campbell's letter "did not relieve the Estate from its obligation under 10 NYCRR 701.3(f) and 401.3(f) [18] to formally give 90 days notice of intention to close and to obtain the Department's written approval of plan of closure." [19] (1.) The State grounded its action in Supreme Court and consistently maintained throughout that litigation, this view as to the applicability and the requirements of the Regulations. (2.) And here, in its Brief in Opposition (pp. 5-6) to these motions for summary judgment the State argues:

"Had Claimants complied with the above-cited regulations, and submitted an acceptable plan of closure, they could have terminated the operation of Abbott Manor within 90 days of notification of closure with the permission of the commissioner."

(C) To the Claimants' contention that the Estate lacked a license as an operator of a nursing home,[20] the State asserts:

"That following Bernard Birnbaum's death, the nursing home's operating certificate of Abbott

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[18] Jasinski affidavit, par 5; see also Kutzuba affidavit, par 57, 58. It may be observed that neither the cited regulations nor Dr. Campbell's letter call for a "written" or "formal" notice of intention to close, nor of the submission of a "plan of closure", though the regulation does require the "written approval" of the commissioner. And see R-52, par 3.

[19] R-49, 50, par 10, 11, 12, 15; R-63, par Fifth; and R-479, l 5; R-481, l 4.

[20] Dr. Campbell's letter of February 27, 1976 stated: "Due to the recent death of your brother who was the sole proprietor . . . the facility no longer has a legally established operator."

Manor, which was maintained in the Department's records in Albany was continued to allow the Estate to operate the nursing home in the interim." [21]

"Section 10 NYCRR 401.1 (c) gives the Department this option. It provides as follows:

"Upon the death of any person, party or member of a partnership to whom an operating certificate has been issued, the commissioner may extend the expiration date of such certificate for such time as in his discretion shall be required for the transfer of such decedent's interest in the facility, for the processing of an application to the State Public Health Council for approval of establishment of a transferee of such decedent's interest and for the processing of an application for an operating certificate on behalf of such transferee."

"This section is designed to insure continuity of operation of a nursing home in the event of the death of a nursing home operator." [22]

9. As a result of a phone conversation with a Mr. Scarlatta, an attorney for the Department, a meeting was arranged and took place in Albany on March 9, 1976.[23] Present for the Estate were co-executor Birnbaum and Miriam Wolf, who had been an administrative assistant to the deceased. The Department of Health was represented by Jerome Jasinski, an Associate Counsel; David Chase, Principal Health Care Fiscal Analyst of the Department of Health; and Mr. Scarlatta.

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[21] Jasinski affidavit, par 6.

[22] *Ibid.*, par 7.

[23] R-83.

10. Claimants allege[24] that at this March 9, 1976 meeting, the following events transpired:

1) The representatives of the Estate reiterated the Estate's wish to discontinue operation of the facility forthwith.

2) The Department stated that alternate facilities were not available.

3) The Department stated "its reluctance to permit the operation simply to discontinue".

4) The Estate offered to lease the home to any new operator.

5) The parties discussed the mechanics of such a transfer, as well as the method by which a rental figure could be determined.

6) The Department (Claimants allege) suggested a consensual receivership pursuant to PHL § 2810 [1] as a means for resolving the unique situation here presented.[25]

(a) that (according to Jasinski) ". . . the Home could only be transferred to licensed operator and because the licensing procedure involved a delay of perhaps a year or more, it would be necessary in order to effectuate the early termination of the Home, for a Receiver to be appointed."

(b) that (according to Jasinski) ". . . the Public Health Law contained a specific provision by which a Receiver might be appointed upon the consent of the Department and the former operator." (§ 2810.1)

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[24] Saul I. Birnbaum affidavit, par 11.

[25] A *casus omissus* which will be discussed hereinafter.

(c) A form of Receivership Agreement was supplied by the Department with the explanation that it needed to be adjusted to the context of a deceased operator.

(d) The Estate advised Jasinski that it had no objection to entering into a consensual Receivership agreement on appropriate terms.

(e) The Estate informed Jasinski that a nearby hospital might be willing to take over the operation of the Home and become its interim Receiver, although it had no assurance thereof.

(f) The Estate requested Mr. Jasinski to propose receivers for this purpose.

(g) The subject of "appropriate rent payment to be made to the Estate" was discussed, "including, *inter alia*, statements made by David Chase . . . *agreeing* that the rental to be fixed would include not only real property and equipment, but also a fair return on equity." [26] [parenthetical material added]

11. (a) On April 7, 1976, a further conference was held at which Claimants allege a "preliminary understanding" was reached as to "changes and modifications" in the Receivership Agreement which "would be acceptable to the Department". And according to Claimants [27] "It thus appeared that both of the Estate's problems had been solved: it could discontinue its unlicensed operations, and while operation would continue under the State's aegis, the Estate would be made whole, both as to costs as well as to rentals and other expenses."

(b) Claimants further allege that at the April 7, 1976 meeting, Mr. Jasinski informed the Estate ". . .

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[26] Birnbaum affidavit, par 12.

[27] Birnbaum affidavit, par 12.

that although the Department had a list of persons and entities available to act as receivers in other areas of the State, the Department did not then have any person or entity to suggest as a Receiver for the Abbott Manor Nursing Home." [28]

(c) The Department was urged to continue their efforts "to find an acceptable receiver since it was then doubtful that the Mercy Hospital . . . would undertake this role."

(d) It is further alleged [29] that " 'Mr. Birnbaum . . . noted that the current rate being paid to the Facility did not cover its operating costs and that it was essential that the transfer be consummated at the earliest possible date.' " Alleged " 'errors in the rates previously paid and being paid to the Home' " were discussed with Mrs. Wall who is alleged to have stated " '. . . that *a receiver would be entitled* to a current rate equal to its reasonable and proper costs in operating the home, and that if we (the Estate) could establish the existence of errors in the rates previously paid, an appropriate adjustment might be made.

(e) Mr. Birnbaum alleges [30] that at the April 7, 1976 meeting, "Mrs. Estelle Wall [31] had represented that if we (the Estate) agreed to go the consensual receivership route, there would be entitlement to all the reasonable and proper costs in operating the Home, prospectively and retrospectively including a proper return on equity."

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[28] *Ibid.*

[29] *Ibid.*

[30] Reply affidavit, par 6.

[31] "Chief Health Care Fiscal Analyst, Bureau of Residential Health Care Facility Reimbursement, Division of Health Care Financing, Office of Health Systems Management, New York State Department of Health". (Her identification as supplied in her affidavit in opposition.)

12. A further meeting was held on May 26, 1976 with the Department in Albany at which the Estate supplied the HE-2 forms and analysis prepared by an accounting firm, as had been suggested by Mrs. Wall at the April 7 conference.[32] Claimants allege that at this May 26, 1976 meeting, Mr. Birnbaum noted again that the rates being paid were substantially below the actual costs of operation, and that it was imperative that corrective action be taken immediately since, as Executor of the Estate, he could not justify or defend the continued operation of the Home on its present basis.[33]

The Department[34] ". . . expressed disagreement with certain portions of the analysis prepared by our accountants, but promised to review the same promptly and to advise what they believed an appropriate rate to be."

"The Department's representative also advised that permanent rates for 1976 had not yet been fixed for any nursing home operators, but that some adjustment would be made to reflect increased costs."

"The Department's representative also advised that they had a substantial question as to whether a rental in the amounts proposed at the April 7th conference would be permitted based upon the Moreland Commission Proposals concerning rental allowances." [35]

Mr. Solomon [36] was of the opinion that an early agreement could not be reached and that a meeting with ". . . more senior representatives of the Department" should be arranged.

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[32] R-86, 87, par 10-12.

[33] R-87, par 12.

[34] R-87 & 88, par 12.

[35] *Ibid.*

[36] Counsel to the Estate; at R-88.

13. On June 30, 1976, Frank T. Cicero, M.D., Second Deputy Commissioner, Department of Health, wrote a letter [37] to Saul I. Birnbaum, as follows:

> "It has come to my attention that you have not responded to department requests for the following: A written request for an extension of the operating certificate for the Abbott Manor Nursing Home, the name of the executor(s) or administrator(s) of the estate of Bernard P. Birnbaum. . . ."

14. Under date of July 8, 1976 a partner of the firm of Ferziger, Wohl, Finkelstein & Steinman, wrote to Dr. Cicero requesting a meeting which developed on August 10, 1976 (R-100).[38]

15. Under date of July 15, 1976 George J. Solomon, Esq. responded to Dr. Cicero's letter of June 30, 1976.[39] In addition to responding to the questions contained in Dr. Cicero's letter, Mr. Solomon wrote:

> "Since Mr. Birnbaum's death in February, we have been in active contact with the Department of Health for the purpose, among other things, of arranging for the transfer of the Abbott Manor Nursing Home to a new operator. (Par. 4)
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> "The Estate, in its initial meetings with the Department, expressed its willingness to enter into a consensual arrangement for the appointment of a new operator as a Receiver pending the formal licensing of the new operator. After discussing such arrangements, we prepared and submitted to the Department many weeks ago a draft agreement for such purpose, but to date have received no response

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[37] Not annexed; taken from Solomon affidavit in Reply, pg 2, par 4.

[38] Exhibit "A" to Florea affidavit, but not included in record.

[39] The letter is annexed, as Exhibit *B*.

thereto. We have also requested the Department to propose persons or entities willing to assume such role, but thus far they have been unable to make any such proposals or recommendations . . ." (He goes on to state that the Estate's efforts have been impeded by the lack of a written agreement with the State; and that the Estate's efforts to settle accounts based on extensive analysis submitted to the Department had also failed to generate a response.) (pg 2, par 1-2).

Mr. Solomon continued:

"The Estate is not desirous of continuing its direct operation of the Abbott Manor Nursing Home indefinitely and one of its principal objectives continues to be the early transfer of this home to a new operator acceptable to the Department on terms acceptable to all. A non-profit organization, with whom we initiated contact, has expressed an interest in the Facility. However, it does not appear likely that any arrangements can be effectuated by July 28, 1976.[40] We, therefore, respectfully request, on behalf of the Estate of Bernard P. Birnbaum, that the term of the operating certificate be extended beyond such date pursuant to Section 701.1 of the State Hospital Code." (pg. 2, par. 3)

16. The State argues that the paragraph above quoted established that the Estate was ". . . aware of the continued extension of the operating certificate," since it "requested an additional extension". (Kutzuba affidavit, par 9.)

17. Mr. Solomon, in his reply affidavit (pg. 2, par 4) states that "[a]t no time in the aforementioned discussions did I or any other representative of the Estate

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[40] The Court is unable to grasp the significance of the introduction of this date.

request any extension of the operator's license . . ." He goes on to state that what he wrote in his letter of July 15, 1976 was prompted by the request for "*written* notification of interim arrangements". (Dr. Cicero's letter of June 30, 1976 [the underlining, Mr. Solomon's]).

18. Under date of August 4, 1976 Jerome Jasinski, in a letter with an enclosure [41] commented on Mr. Solomon's letter to Dr. Cicero, as follows:

> ". . . I am concerned about your statement that you received no response to the draft receivership agreement submitted some weeks ago. You may recall that not long after the submission of that proposed agreement, you and I had a telephone conversation wherein I indicated the areas unacceptable to the Department as stated. I can only assume that you meant you had received no written response. Therefore, please find enclosed my comments on the proposed draft receivership agreement. (par. 1).
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> "You also seemed to imply that the Department was impeding your efforts to transfer the facility by its irresponsiveness. On the contrary, your questions have always been quickly answered, albeit not necessarily with the answers which you wished to receive. I should like to point out that although we have been unable to locate any persons or entities willing to assume a receivership role, your efforts have been similarly unsuccessful. Indeed, I have personally spoken to representatives of Mercy Hospital and Our Lady of Victory Hospital (two of the entities you proposed), but each has since indicated a lack of interest in acquiring or operating the facility." (par. 2) [42]

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[41] Appended to this Decision, as Exhibit *C*.

[42] In par. 8 of his affidavit in opposition, Mr. Jasinski traces the failure of these initiatives to the Estate's unwillingness to accept a

Mr. Jasinski continued in his letter (par. 3) to advise Mr. Solomon that the apparent effort to tie the settling of account with the appointment of a receiver was misplaced and unnecessary.

The enclosure containing Mr. Jasinski's thirty (30) amendments to the proposed receivership agreement, as drafted by Mr. Solomon, makes the estimate [43] that the parties were in substantial agreement or to its terms, somewhat optimistic. See particularly comments numbered:

"3. Page 1, Paragraphs 4 and 5—The Department is not proposing anyone as the new operator; the Estate is. In the meantime, the Receiver will be an interim appointee . . .

4. Page 1, Paragraph 7—. . . Please also eliminate the phrase 'pending the processing and approval of its license;' The implication is that the license will definitely be approved.

5. Page 2, Paragraph 1—Please delete . . . The Department will not guarantee that a substitute Receiver can be found or that the facility will continue operations. See also comments 6 and 12.

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18. Page 6, Paragraph 3—The Department will not pay any and all costs incurred since April 1, 1976. Costs determined to be reimbursable will be reimbursed. See also comments 21, 26 and 29.

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rental amount equivalent to the maximum allowed Medicaid reimbursement rate for real property that the State would reimburse the Hospital.

[43] Birnbaum affidavit, par 11.

28. Page 15 . . . Lines 4 and 5. The Receiver is not assuming the assets and liabilities of the Facility."

19. Mr. Jasinski in his affidavit (par. 9 *et seq.*) and Mr. Chase in his affidavit (par. 4, 7, 8, 10) deny that there was any promise to reimburse the Estate for its alleged losses, and they assert it was made clear to the Estate's representatives that the Department could do nothing beyond the legally authorized limits of the Medicaid reimbursement system established by the Public Health Law. (See Kutzuba affidavit, par. 12). Claimants object to the conclusory nature of these affidavits and the Court would have been aided by a more detailed recitation by the State's witnesses as to their version of the course of these meetings.

20. There was yet another meeting between the State and the Department on August 20, 1976, the Claimants' version of which is contained in a letter dated August 18, 1976 [44] from Sidney A. Florea, Esq. to Dr. Cicero. Without undertaking a detailed exegesis of the letter it can be noted that it restates Mr. Birnbaum's dismay at what he perceived to be "staggering . . . operational deficiencies" inconsistent with his duty and authority as a fiduciary of the Estate, and that he had only agreed to continue the operation of the Nursing Home because ". . . he had every reason to believe was his status as an *ad hoc* Receiver, and continued to operate "with the assurance that all operational costs during the period of his interim operation would be fully reimbursed . . . and that . . . could not be done utilizing the 1973 rates." (Pg 2, par 2 of Florea letter.) Mr. Florea continued, "Were Mr. Birnbaum's understanding of his position other than as above outlined, he would have been compelled, though reluctantly, promptly to close down

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[44] Appended to this Decision as Exhibit *D*.

the facility." (*Ibid.*, par 3.) He continues (pg 3, par 1) as follows:

> "I think it was generally agreed by all those present at our conference that the circumstance of an individual's obligation as the fiduciary of the Estate of a deceased licensee was simply one that was not foreseen by the legislators who consequently made no provision in the law to deal with the resultant circumstance. Certainly it was not the intention of the legislature in enacting Section 2808-a .1, .2 to revoke or supersede controlling sections of the EPTL. I think it was recognized that this unique circumstance required an equitable solution which we confidently expect will be found. It is for this reason that Mr. Birnbaum agreed with the Department's suggestion that, notwithstanding all cogent reasons militating against such action, he would maintain the facility for 'two to three weeks' from the date of our conference on August 10th.
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> "Please be advised that Mr. Birnbaum cannot and will not continue to waste Estate assets by the operation of the home one day beyond August 31, 1976, the last day of this month. It is Mr. Birnbaum's sincere hope that the Department will by then recognize as valid the claim of his brother's estate, authorize continued operation . . . at present costs and make immediate reimbursement. . . ."

21. Dr. Cicero responded [45] under date of August 24, 1976 to Mr. Florea's letter, *supra*, and having "discussed it with my staff" repeated his conclusion expressed at the meeting that ". . . the first step toward resolving your client's difficulties was to review the current staffing levels . . . in view of any possible rate appeals." As a result of a staffing analysis which he had ordered, Dr. Cicero concluded ". . . that the hiring of the following

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[45] Appended to this Decision as Exhibit *E*.

additional employees was justified;" (some 8 employees) and "I am willing to accept full reasonable costs and to reimburse Mr. Birnbaum for these additions retroactive to February 1, 1976 except for those hired since February 1; for these rate adjustments will be effective the date of employment (pg 2, par 1). And having noted some overstaffing the decreases of which would offset costs and possible management problem, Dr. Cicero suggested contact with "Mr. Davidoff, Associate Director, Health Care Cost Control . . . concerning the rate adjustment which I have authorized."

22. Various and differing accounts are given by the State as to what transpired at the August 10 meeting and the interpretation to be placed on Dr. Cicero's letter of August 24, 1976:

(a) *Dr. Cicero* in his affidavit (par 3 & 4) avers that ". . . [it] was carefully explained to Mr. Birnbaum . . . that any upward adjustment in . . . Medicaid reimbursement rate could only be made within the parameters (sic) of the generally applicable rate-setting methodology . . . (which is essentially prospective in nature) with future rates based on costs experienced by a facility in a prior, base year. These prospective rates were 'reasonably cost related' and a facility was expected to keep its expenditures within these limits," and the Department "would not simply guarantee Claimants full cost reimbursement". Other than the "staffing analysis" which would supply the "one possible source of additional reimbursement . . . based on recognition of the costs of additional staff" no other commitments are made, and Dr. Cicero urges that Mr. Florea's own letter in which he gives his account of the August 10 meeting by the use of the word "hope" reveals that no such commitment was made.

(b) *Mrs. Estelle Wall*, in her affidavit likewise emphasizes that repeated explanations were given to

Mr. Birnbaum, et al., of the Medicaid reimbursement program, and its methodology, and its prospective reimbursement feature based on base year costs.

(c) *Mr. Chase*, like Dr. Cireco and Mrs. Wall, fails to give a factual account of what was said at the August 10, 1976 meeting, but does insist that no promise of reimbursement was or could be made (par. 9 and 10).

(d) *Mr. Jasinski*, (whether he was at the meeting or not is unclear) asserts that the contention that the State ". . . cozened the Estate into continued operation of the nursing home is absurd;" that "[t]hroughout the arms-length negotiations . . . the Estate was represented by counsel" and he explains his and the Department's reaction: "The Estate wanted to keep its building in operation to collect rent and it was my impression that the Estate was threatening closure as a means of increasing its medicaid reimbursement to a level higher than it was entitled to under existing law." (Jasinski affidavit, par. 15)

23. It is worth observing that no one contradicts the statements in Mr. Florea's letter of August 18 (page 3) that at the meeting of August 10 there was agreement that the Legislature had not foreseen and had not provided a statutory solution for the situation confronting the parties, nor denies that the State suggested and Mr. Birnbaum agreed to maintain the facility for two to three weeks; and, of course, cannot deny that Mr. Florea stated that Mr. Birnbaum ". . . cannot and will not continue to waste Estate assets by the operation of the home one day beyond August 31, 1976 . . .", with the expression of hope that by that time the State would recognize the Estate's claim, authorize operation at current costs and make immediate reimbursement.

24. Mr. Florea, upon reading Dr. Cicero's letter concluded that: "From the foregoing" (i.e., the Depart-

ment's consensus expressed at the August 10 meeting that the Medicaid reimbursement shortfall in meeting actual out of pocket costs was the result of an overstaffing of 13 positions, whereas Dr. Cicero's letter reported that a review showed only 3 part-time employees)[46] that "it appeared plain to me that with the exception of the three employees considered unnecessary by the Department, our problems had been resolved and that there remained only the need to contact Mr. Davidoff to attend to the formality of reducing our agreement to writing and accomplishing a very early, orderly transfer of operations from the Estate to the State licensed operator."[47]

25. Mr. Florea traces both his exasperation at the manner and his consternation with the revelation that he was mistaken in his conclusion (R-100-106) and that after conferring with Mr. Birnbaum, the telegrams (R-57) were sent to the next of kin of the patients, advising them on September 3, 1976, that because the Department of Health refuses to pay medicine and medical care ". . . we are unable to continue [patient's] care" and "[a]ccordingly, you are advised to make the necessary arrangements to have your relative removed no later than September 7, 1976 at 7:00 p.m." To patients cared for by other than Medicaid, a somewhat fuller explanation was given.

26. The State commenced an action in Supreme Court (Erie County) to enjoin the closing of the nursing home "without compliance with the applicable provisions of the State Hospital Code, Title 10, NYCRR, part 700".[48] And

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[46] R-101-102.

[47] R-103. The Court is simply unable to follow the reasoning. There appears to be at least one premise missing. But then to adopt as a first step a staffing analysis to add some eight employees to solve the operating loss (Dr. Cicero's letter) is too subtle for this Court.

[48] R-64.

ancillary thereto by Order to Show Cause based on the affidavits of Michael G. Wolfgang, Assistant Attorney General of the State of New York, of counsel to Louis J. Lefkowitz, the then Attorney General of the State, alleging the failure of the defendants to comply with 10 NYCRR 701.3 [f], and Section 401.3 [f] [49] (i.e., closing without the written approval, etc.) and of Dr. LaVerne E. Campbell, Regional Health Director of the Department who swore that no application to close nor plan to transfer to other facilities had been made nor written approval given as required by Section 701.3 [f] (R-52-53) and that there were no available beds in nursing homes in the area, the State was granted a Temporary Restraining Order enjoining the defendants from *inter alia*, ". . . discontinuing, reducing or threatening to discontinue or reduce the level of care and treatment provided for the patients residing at the Abbott Manor Nursing Home . . ." [50] The Order to Show Cause was made returnable on the 10th day of September, 1976.

27. The return day of the Order was adjourned to September 15, 1976 [51] at which time defendant (the Estate) had filed an answer in which they denied they had proceeded to close without notice and further denied they needed the approval of the Commissioner of Health (R-67); asserting that they had the responsibility for providing for the patients of the nursing home without legal authority or standing (R-69), that they had been unsuccessful in obtaining the appointment of a receiver because the failure of the Department to comply with PHL § 2810; because the Department had been arbitrary and capricious (R-69) etc., etc.; and that the Court had authority to appoint a receiver pursuant to § 2810 (R-69). In the accompanying affidavit of John J. Phelan,

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[49] R-50.

[50] R-45.

[51] R-109.

Esq. (R-78 *et seq.*) the argument was advanced that the State had chosen the wrong method by which to proceed. "The plaintiff should have sought the appointment of a receiver pursuant to § 2810 of the Public Health Law . . ." (R-79, par 7); and "that the application . . . for a preliminary injunction be denied—a receiver be appointed—[and] that there be further proceedings . . . to determine the appropriate terms of the receivership," etc. (R-80, par 8, 9, 10). The defendants requested that they be "compensated fully for the actual cost and value of the care and maintenance of the patients" (R-81, par 11; R-75; R-72-73, par Twenty-Fourth). The affidavits of George J. Solomon, Esq. and Sidney Florea, Esq., which have been reviewed herein, detailing their efforts to obtain a receiver or otherwise to compose the dispute by relieving the Estate of the burden of operating the enterprise at a loss, and the affidavit with exhibits attached of Sidney Finger, a certified public accountant, detailing the losses being experienced by the Estate were submitted (R-89-98).

28. Mr. Florea, in his affidavit (R-106, par 12) averred and proposed *inter alia*:

> "12. Movant seeks an injunction compelling respondent to continue operation of the nursing home and to compel respondent to do so at a significant daily loss. The thought immediately occurs and I respectfully urge that to compel respondent to do so is an unconstitutional taking of property without due process. Recognizing the social problems involved, I would respectfully suggest that a solution of the problem in equity would be that respondent continue to operate the facility for a period of 90 days and that the State of New York . . . promptly reimburse the respondents for monies paid to them for Medicaid patient care since

February 13, the date of the death of the licensed operator . . ." [52]

29. By an Order dated November 4, 1976 the Court appointed two long-time employees of Abbott Nursing Home as Receivers, *nunc pro tunc*, as of October 20, 1976 (R-111). The appointment of the Receivers to operate the nursing home marked the conclusion of the events which constitute the claim set forth in Claim No. 63694, and the beginning of those which constitute Claim No. 63695. Though mindful of the separateness of the Claims, the Court will continue the chronology.

30. The parties at the direction of the Court met in Mayville on November 10, 1976 in the early evening hours and agreed to certain provisions of an Order [53] being settled that evening; [54] though the State later argued that it had not agreed to that portion of the Order (R-116) which provided for the granting to the Defendants the right to a hearing ". . . upon determination being made by the Commissioner . . . adverse to the payment of the actual costs of the co-receivers for the care and treatment of the patients." [55] This disagreement aside, the Attorney General insisted, and the Court and the other parties agreed, that (1) an agreement had been reached with respect to the Receivership, *et al.*, and that (2) there would be a hearing for the purposes of ". . . setting of a fair amount for the home" (R-145, l 23-R-146, l 20; R-156, l 13-20; R-151, l 10-18; R-158, l 10-18.)

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[52] There is nothing to reveal why the State rejected the proposal which would indeed have considerably shortened the dispute.

[53] The Order of November 23, 1976; R-112, 118.

[54] R-141. There was no stenographer present (R-151); and to the extent there was any disagreement on this point the defendants' account (R-18, l 14 *et seq.*) of the agreement was the one adopted by the Court.

[55] R-143, l 2, *et seq.*

31. The Court issued a further Order on November 23, 1976 (R-112-118) in which the powers and responsibilities of the Receiver were defined and limited as contained in § 2810 of the Public Health Law, the co-receivers being appointed pursuant to the equity power of the Court to implement § 2810 of the PHL (R-115); the application of defendants for a hearing and determination of the fair monthly rental and for the determination of the value of the assets delivered to the co-receivers and the accounting thereof, etc., all in accordance with § 2810, and the equitable power of the Court, was denied for a period of ninety (90) days from the date of the Order with the proviso that if upon a determination being made by the Commissioner of Health adverse to the payment of the actual costs of providing care and treatment to the patients, then defendants would be entitled to an immediate hearing and for the prompt determination of all of the issues (R-116-117). The Court vacated the temporary restraining order, denied the application for a preliminary injunction (R-117) and denied defendants' application for a preference for the trial of their counterclaim and the application for the Medicaid reimbursement funds for the month of October, 1976 (R-117), all pursuant to the agreement of the parties.

32. Gary S. Bittner, attorney for the co-receivers, alleges in his affidavit that by letter dated November 10, 1976[56] he advised the Department that the Receivers had insufficient funds to enable them to continue operations (R-127). On December 1, 1976 Bittner and the co-receivers met in Albany for the purpose of discussing rate reimbursement and the request for actual costs incurred. Mrs. Estelle Wall, speaking for the Department, advised that she had no authority to authorize reimbursement in excess of the fiscal year 1974 rate plus

[56] The parties are requested to supply letter dated November 10, 1976.

18.5%, and that the only way to increase the rate above $28.22 per patient per day that had been previously set, would be to increase the number of full-time employees (R-128). Bittner alleged that the affidavits of the co-receivers recited in detail their contention that rather than an increase of 18.5% over 1974, the increase in cost was close to 49%. A social worker swore in an uncontradicted affidavit that there were no alternate facilities available for the patients of the Home, and in an affidavit the Vice-chairman of the Western New York Hospital Social Work Directors Association, outlined the number of patients awaiting nursing home placement and the waiting time involved by reason of the lack of facilities (R-136-139).

33. Upon the return day of the motion (December 15, 1976) the parties appeared by counsel (R-140) and the Attorney General objected to proceeding upon the ground that he had not agreed that an adverse ruling would trigger an immediate hearing (R-141, *et seq.*) although as noted, the State had stipulated, consented and agreed to all of the other terms of the Order, including the dismissal of the temporary restraining order, the denial of the temporary injunction, and appointment of the co-receivers, the source of their duties and powers and the limitations thereon, as well as the appropriateness of a hearing to determine the fair rental value as referred to in § 2810, subd 2 (b).

34. Notwithstanding the prolonged arguments as to whether the Order of November 24, 1976 comported in all respects with the State's version of the agreement of November 10, 1976 settling the Order, the Court directed the hearing to commence, and Sidney Finger, a certified public accountant, testified on behalf of the State (R-159) to a Statement of Account—an account relating solely to income and operating expenses of the Home, and not to the "fair monthly rental" figure (R-167).

Despite objection from the State, the Court received the testimony, expressing its concern, as it was to do several times thereafter:

> "[T]he Abbott Manor is in danger of being closed down immediately. And, the sooner we get the evidence on the record, the sooner the Court can make a determination." (R-167, l 17 etc.;) and see the Statements (R-154).

35. The Court repeated its concern that the receivers obtain enough funds from Medicaid sufficient at least to meet the payroll and to pay the bills of vendors and suppliers (R-371; 375; 389; 434-435).

The Court stated its choices as follows (R-443-444):

> ". . . Now, Mr. Schmidt [the Assistant Attorney General] was advised that this hearing was called to provide for a smooth day to day operation of the Abbott Manor Nursing Home so that the receivers have enough money with which to operate. As far as the rental, all those issues, I have deferred judgment on those and I'll give you an opportunity to present your side of the case, Mr. Wolfgang, but right now I want to make sure that Abbott Manor Nursing Home is not going to have a crisis from week to week and we are going to establish reimbursement. Otherwise my intent is to close it down and turn it right over to the State." [parenthetical material added]

36. The Court had previously stated in the course of the hearings, in response to a question, how the problem had arisen and what the Court was seeking to accomplish pending a final solution:

> "THE COURT: The Estate wanted to close down the home because it wasn't making any money, and the state moved in for a restraining order, preventing the Estate from closing the home. But, neverthe-

> less, the Estate was standing severe losses because of what has just been said over here, because of the intransigents [sic] of the administrative authorities, concerning Medicaid, and then I appointed receivers to make sure that these patients are cared for, somewhere along the line. And, all I want, Mr. Schmidt, now, is to knock some heads, that we keep this home going until we determine a fair rental rate, until we determine what a true operating cost is, until such time we are reimbursed, to keep this as a going institution, or until such time as it is sold or taken over by the state."

37. The Court restated its concern—"I don't want to be forced into the position of closing this home down if it's at all possible but if you people are going to . . . continue operating in this manner, there will be no choice . . . the home will have to be closed." (R-451, l 3-11). To which the Attorney General responded:

> ". . . I don't think that the State can be accused of trying to close this home. In fact this whole proceeding began because we wanted to keep this home open and we took some extraordinary measures over the Labor Day weekend to do just that . . . ." (R-451, l 15-22)

38. In answer to the argument and its adoption by the Court (R-469, l 20; R-472, l 8) that the Comissioner of Health was in truth the principal of the Receivers, the Attorney General pointed out that the Receivers were appointed upon the application of the Defendants pursuant to PHL 2810, and neither that Order nor the November 24 Order supported that claim, which prompted this colloquy: (R-479, l 5):

> "THE COURT: Tell me, Mr. Wolfgang, if I terminate the receivership and turn it over to the Commissioner, will he still be forced to pay it to the County of Erie?

MR. WOLFGANG: I know not. However, sir, the question arises that upon termination of the receivership the ownership and operation of that reverts to the estate of Mr. Birnbaum and the estate of Mr. Birnbaum is going to close the home and then a lot of those patients will be transferred to hospitals at a hundred dollars a day instead of thirty-two or whatever the rate is. Now, they tried to close the home before without complying with the regulation that—

THE COURT: The only reason that home was permitted to operate was because you people came into court and you got a restraining order on closing this home down.

MR. WOLFGANG: That's correct, sir.

* * * *

THE COURT: So the State has the choice and the State can't force Birnbaum to operate something as a loss.

MR. WOLFGANG: No, but it can force him to adhere to the policy of transferring these patients to another facility.

The COURT: And we are going to get into that. It's sure going to be part of the law suit.

MR. WOLFGANG: That is the law suit.

THE COURT: You've got a temporary restraining order so we are not at this particular stage trying to please all parties. But, Mr. Wolfgang, under no circumstances is the estate going to be forced twenty thousand dollars into debt month after month because the State wants him to operate the facility.

MR. WOLFGANG: I might add, Your Honor, that judgment has been previously made. They were forced to continue the operation of this facility until

October the 20th in face of the stated losses because the Hospital Code requires that patients not be dumped out on the street with a two-day notice."

39. Under date of December 29, 1976 the Supreme Court issued a further Order (R-705-710) in which the Court recited its determination that it was an administrative function of the Commissioner of Health pursuant to Article 28 PHL to pay the actual costs of care and treatment during the period of the Receivership and having failed to do so, the Commissioner was ordered to pay the co-receivers each week a sum of money sufficient to meet the actual costs and in the Order the Court provided a methodology for the submission by the Receivers to the Commissioner of vouchers and itemized statements of the costs of care and treatment.

40. The State appealed from that Order (R-711) and pursuant to § 5519 (a) of the CPLR an automatic stay of the Order was effected.

41. On February 28, 1977 the State presented to the Court its appraisal testimony relating to the "fair monthly rental" to be charged the Receivers by the State, and the method and result of that appraisal opinion was recited (R-525-541).

42. Under date of June 30, 1977 Judge Kasler rendered a decision (R-27) which was intended to serve as the basis for an Order to set the fair rental value for the premises and to determine defendants' entitlement to property taxes, monies advanced to the receivership, the allocation of the October 1976 Medicaid, Medicare and private monies, and for interest expenses for loan to the Receivers.

43. Under date of October 7, 1977 an eight-page letter was submitted to the Court directed to the Decision of June 30, 1977; requested a date for argument (607) and raised issues to be argued (R-608-609).

44. On January 10, 1978 because of the alleged fiscal impossibility of continuing the operation of the Home under the circumstances, the Receivers, at the direction of Judge Kasler, issued a 90-day notice of closure (R-698, par 24).

45. On January 12, 1978 the parties appeared before the Court to argue the issues raised by the letter of October 7, 1977 directed to the Decision of June 30, 1977. It was the State's position that there was ". . . no reason to disturb the Court's decision" it having been decided "on the credible evidence". (R-610). The Court had adopted the "fair monthly rental" figure found by the State's appraiser using the "market data approach" (R-666). The State's position was (R-667, l 7, *et seq.*)

> "Now your honor, we have no quarrel with it ($7,-100.00). We would have really had no quarrel if you had said seventy five hundred ($7,500.00). We felt this was the opinion of an expert who—value-wise—has been proven many times in previous Court appearances . . ." [parenthetical figures added]

And see R-667, l 22-668, l 6, to the same effect.

The State maintained its position that the attempted closing of the Home in September 1976 was illegal (R-668-670) and the State observed ". . . this Court in its wise judgment decided that during the pendency of the action, that receivers should be appointed to insure the health and well-being of those patients." (R-670).

The State argued that ". . . property taxes" were included in the "fair monthly value" (R-670) and there should not be separate reimbursement.

The Claimants argued that both appraisers arrived at the "fair monthly rental" value on terms of a "net-net" lease (R-618-620; 682-683); that they were entitled to be reimbursed for the agreed value (R-562) of the inventory taken over by the Receivers, as well as for the

monies advanced by the Estate, the interest expense incurred in obtaining monies to advance to the Receivers, etc. In the main, these arguments prevailed.[57]

46. Under date of January 17, 1978 Dr. Robert Ehinger, assistant Regional Health Director for the New York State Department of Health, wrote to Mrs. Theresa Skokowski, Administrator and Co-Receiver (R-784-785). The State maintains that this letter embodies the "closing procedures necessary to protect the patients' welfare which the defendant (the State) by means of the eventual proceeding for a temporary restraining order, sought to compel claimants to comply with . . ."[58] Given that importance we undertake to quote the letter:

"January 17, 1978

"Dear Mrs. Skokowski:

Since the Abbott Manor Nursing Home is to close within 90 days, the following procedures are to be followed:

1. Appropriate staffing and services are to be maintained until all of the patients have been relocated, even in the event the closure may exceed the 90-day period.

2. Each patient, his next of kin and/or sponsor and his/her physician are to be notified that the nursing home is closing.

3. Each patient is to be transferred to an appropriate facility after consultation with the physician, the patient and the sponsor.

4. The medical records of all patients are to be maintained in a safe place for six years. The lo-

[57] See Memorandum Decision dated March 6, 1978 (R-32-35).

[58] State's Brief in Opposition to Claimants' Motion for Partial Summary Judgment, (pg 2-3)

cation is to be approved by the Department. Notify me in writing of the intended storage place of the patients' records i.e. the address and the name of the person who owns the building and the name of the person who will be responsible for assuring the safekeeping of the medical records.

5. Notify me in writing of the disposition of all patients i.e. the name of each patient, the date and the facility to which each patient was transferred.
6. The operating certificate is to be returned to me by certified mail on the day the nursing home closes. The controlled substances certificate is to be returned at the same time.
7. All controlled drugs are to be returned to the Narcotic Investigator at the State Health Department Regional Office, 584 Delaware Avenue, Buffalo, New York 14202.
8. Admissions to the nursing home are to be discontinued.

If you have any questions, please contact either Miss Zdorjewska, Health Program Administrator, at the Buffalo Area Office or myself.

Very truly yours,

Robert Ehinger, M.D.
Assistant Regional Health Director

/ff

cc: Mrs. Margaret Galuch,
Co-Receiver
Mrs. Regina Malone—Bureau
of Long Term Care
Mr. Kradel—Erie County Health
Department

bcc: Dr. Campbell"

47. The Attorney General had advised the Court (R-675):

> ". . . I am informed that the ninety day notice provided for by the Health Law has been given. I assume that in the main, we'll all be concerned about trying to find placement for the people in the home within the next ninety days. For that matter, I— — I just tell the Court that there was an inquiry not more than, I think Monday of this week—no, I am sorry Your Honor, Friday of last week to Dr. Ehinger, who is the Regional Health Officer in charge as to the availability in a different context, complete availability of beds in Erie County. And he told me there is not more than five or six empty beds present in the County today. The situation has not greatly benefited by any new construction or anything of the sort. It will still be a problem securing bed placement for these people. But I agree with you that time has come, perhaps to relieve the receivers of the burden and to wind up the entire matter." [59]

48. Under date of January 17, 1988 Gary S. Bittner, attorney for the Receivers, petitioned the Appellate Division to dismiss the Notice of Appeal [60] from the Court's Order of December 29, 1976 for failure to prosecute, and Mr. Justice Dillon on January 20, 1978 signed an Order to Show Cause which vacated the stay pursuant to CPLR 5519 (c) pending the resolution of the Order on February 13, 1978.

49. On January 28, 1978 further argument was had before Justice Dillon to request a reconsideration of his

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[59] Thus Dr. Ehinger's "closure notice", a model that the State obtained an injunction to compel the Claimants to emulate, lacked a realistic or realizable basis for its essential premise—i.e., there simply weren't any facilities available to which the patients could be transferred.

[60] R-693.

vacating of the temporary stay at which time the State argued that it was not possible to comply with the terms of Judge Kasler's Order of December 29, 1976. Justice Dillon conditioned his lifting of the vacatur on the establishment of a reimbursement sufficient to enable the co-receivers to meet the expenses, etc. (R-721, par 4), and on February 2, 1978 the Director of the Office of Health Systems Management certified Medicaid reimbursement increases having an impact of approximately $30,000.00 for the last five months of 1977, and $6,000.00 for the month of January, 1978 (R-721-722), and based on this representation and that "the amount of expenses actually paid out in 1977 exceeds income by no more than $24,000.00" (R-722, par 7),[61] the vacatur was lifted.

50. Under date of February 16, 1978 in a letter with a three-page exhibit attached labeled a "management assessment" was sent by the Department of Health's Office of Health Systems Management in the trust that it would prove beneficial[62] in the staffing and operational aspects of the facility. (R-777-780).

51. Under date of March 24, 1978 in a three-page letter (R-781-783) the same Office of Health Systems Management, after expressing their willingness to discuss the management assessment in detail, submitted a "Physical Plant Evaluation" containing sixteen (16) items of renovation and repair, at least three of which were regarded as major alterations by the Department (R-783).[63]

52. Under date of April 11, 1978 Judge Kasler signed an Order to Show Cause directing the State and the Defendants to show cause why an order should not be made

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[61] Since it is undisputed that no rent was paid, confessedly Medicaid did not provide a rental basis for 1977 and no provision was made for rent for 1978.

[62] Presumably in the 60 days remaining in the "Closure Notice".

[63] Presumably in the 30 days remaining in the "Closure Notice".

and entered continuing the said co-receivership for a period of twelve months from and after April 20, 1978, as requested in the supporting papers attached thereto.

53. The Attorney General in the answer and return of the State dated April 19, 1978, while admitting the unavailability of bed space (2nd and 4th) nonetheless prayed for a judgment denying the application to continue the Receivership (R-765) and in his return the Attorney General argued that the Receivers had Management and Physical Plant problems (R-733), that some transfers had already been made, and in that the answer to the problems of the Home was "not the continuation of the facility in its presently constituted state." (R-775).

54. On April 20, 1978 the parties appeared in response to the Order to Show Cause (R-804).

55. Mr. Bittner, counsel for the Receivers, speaking on behalf of the motion to extend the period of the Receivership, restated the position confronting the parties and the Court (R-834 *et seq.*)—viz., the "extreme shortage of nursing home beds in Erie County", with approximately four hundred patients in hospitals awaiting placement, and the consequent inability to place the patients in another facility (R-836); his further recitation as an officer of the Court that at the meeting in Mayville in 1976 that agreement had been reached not to diminish patient population (R-837), and again in Albany in March of 1977, they had received the same direction.[64] Between January 10 and April 20, 1978 the patient population diminished by twenty (20) by reason, princi-

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[64] Surely the Department was aware that the Receivers were accepting new patients from its close supervision records of the facility, the extensive reports, and surely Dr. Ehinger's direction in the "closure notice" paragraph 8, "admissions to the nursing home are to be discontinued" could have no other meaning than that the Receivers having been directed not to diminish patient population were now being instructed to diminish patient population.

pally, of death ((R-839); two being transferred to the County Home by reason of direct intervention of an officer of the State Health Department (R-878), at a per patient rate of forty-six dollars ($46.00) compared to the thirty-five dollar ($35.00) Medicaid Rate then existing at Abbott Manor (R-879). Counsel for the Receivers stated his concern as to the emotional impact that a sudden transfer would have on the patients, as well as the cost in excess of $120.00 per day to hospitalize the patients (R-853-854). But he stated as to closure ". . . if that is what the Health Department wants to do with Abbott Manor, so be it," (R-865), noting however, that it was an important community asset.

56. At the April 20 hearing the Attorney General spoke in opposition to the motion. He first addressed himself to establishing the point that the Regional Health Officer of the Department of Health had extensive experience in the closing of nursing homes (R-848 *et seq.*). The Attorney General's argument is somewhat discursive, and beyond the ability of this Court to paraphrase, so the State's position as to the relief to be granted is quoted as follows: (R-852, l 18 to R-853, l 20);

> "Your Honor, as far as the transfer is concerned and as far as the extension of the receivership is concerned, it would be the position I believe, of the Department of Health, and I do have counsel here, that the Department of Health looks not to throw people out in the street, of course not, but looks for an orderly transfer of these patients, so that equivalent level of care may be maintained, and that it looks like eventual curing of the attendant problems here, that this receivership should have a more limited duration than the twelve months, to keep those problems at a lesser degree, but not just to say okay, we'll end all the receivership now, and that they suggest to me, the Department of Health, the function of the ninety day, it is my understanding, how

> the procedure goes about that the people call the other homes, they work with Social Services, they have come in and then, it's an orderly procedure, where the expertise of this particular department has been in existence since 1966."

And the Attorney General restated the State's position (R-854, l 15 to R-855, l 4):

> "I would say nobody wants to close, for many kinds of reasons. I think reality, the reality of it is that nursing homes do close for one reason or another. And what the Department of Health's position is, there should be an orderly transfer. And, there probably should be some final limitation, perhaps the Court might consider a conditional order on this matter. Lastly, Your Honor, the Attorney General and the Department of Health does not challenge this Court's equity power to extend the receivership."

57. At the April 20, 1978 proceeding, the attorney for the Estate recounted his experience in attending meetings with the State agencies concerning the Nursing Home, and his subsequent bewilderment. Finally he put a direct question to the fellow from the State Department—"You want this nursing home to remain open, or do you want it to close" and the State's position was "we want it to remain open" (R-859-860). Counsel stated at that meeting as in the Court proceeding, the Department of Health was being less than forthright in its address to the problem and to the practical alternatives (R-860 *et seq.*)

58. Under date of May 8, 1978 the Supreme Court by Judge Kasler issued an Order (R-8) pursuant to § 2810 (e) (i) of the Public Health Law terminating the Receivership of October 20, 1976 created pursuant to § 2810 (2) of the Public Health Law, directing the co-receivers to render a full and complete accounting, etc., and then

the Court by Order made provision for three general areas:

> I. The Court appointed a successor Receiver (Robert P. Whalen, Commissioner of the Department of Health) to ". . . take full responsibility for the operation and maintenance of said facility and shall take full responsibility for all operating and maintenance expenses during the period of his appointment" and established the term of the Receivership to survive until further Order of the Court (R-9).
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> II. The Court ordered the Commissioner as successor-receiver to take responsibility for the expenses incurred by the receivership just terminated, specifically detailing (1) the fair monthly rental as determined by the Court on March 6, 1978; (2) the monies advanced; (3) the agreed upon value of inventory in the amount of $48,094.91; (4) the proportionate allocation of income and expenses for the month of October, 1976; (5) the interest-expenses incurred for money earned; and (6) other expenses (R-9-10).
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> III. The Court by Order in general and detail addressed itself to the duties, authority, responsibility and functions of the Receivers including ". . . if he deems it necessary, to provide for the orderly transfer of all patients in Abbott Manor Nursing Home to other facilities or to make other provision for their continued safety and health care." (R-10).

59. Under date of June 2, 1978 the State filed a Notice of Appeal (R-5) from the Order of May 8, 1978 "directing the Commissioner . . . 'to take full responsibility for all expenses incurred by the receivership just terminated' . . ." i.e., from that portion of the Order in the general area configured in paragraph 58 (II), *supra.*

60. On May 25, 1978 the Supreme Court (Kasler, J.) issued an Order (R-14) reducing to judgment the various sums and amounts found due and owing to the Estate of Bernard P. Birnbaum by the State of New York, as set forth in the Court's Memorandum Decision of March 6, 1978 (R-32), i.e., fair rental value, real estate taxes, monies advanced, reimbursement for all inventory, the proportionate allocation for October, 1976, etc.

61. On June 20, 1978 the State appealed (R-11) from the Order of May 25, 1978 directing that Judge Kasler's decision of March 6, 1978 be reduced to judgment and detailed in the notice of appeals the items of money damages excepted to. (R-11, 12).

62. On July 21, 1978 a Final Judgment was entered on behalf of the Estate reducing to judgment the amounts computed in the manner set forth determined to be recoverable in the Court's memorandum decision of March 6, 1978, its Order of May 25, 1978, together with costs and disbursements, etc. (R-22-25).

63. On August 11, 1978 the State filed a general notice of appeal from the Judgment entered July 21, 1978.

64. On November 2, 1979 the Appellate Division, Fourth Judicial Department, in accordance with the Opinion by Witmer, J., in Appeal No. 1—

1) Modified the Order and Judgment of the Supreme Court entered May 25, 1978 and July 21, 1978 by deleting from the award therein any amounts other than patient allowances (R-1057);

2) In Appeal No. 2 unanimously affirmed the Order granted May 8, 1978 (see par. 58 *supra*) with the same opinion as in Appeal No. 1 (R-1059);

3) And by the same procedure, the same Opinion dismissed the appeal from the Order of December 29, 1976 (R-1061).

65. Judge Witmer's Decision (R-1064) reviewed the course of the proceedings that brought the matters before the Appellate Division and observed that the judgment sum of $416,714.00 on its face included "allowances for rent of the facility, real estate taxes and insurance, reimbursement for money advanced to the receivership by the estate for payroll . . . etc., and also reimbursement for the value of inventory and for Medicaid and Medicare and private patient fees." (R-1066). The Opinion held that though the Supreme Court had jurisdiction to determine the administrative issues, the proper procedure was to consider them in an Article 78 proceeding, and doing so the Appellate Division then affirmed, (R-1066) on its own motion.

The Opinion held that ". . . absent specific statutory authority (see Public Health Law, § 2810), trial term properly assumed jurisdiction to exercise its equitable powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients." (R-1066). "Such jurisdiction, however, did not authorize the court to determine the consequent issues as to who should bear the operating losses not governed by regulation for patient care allowances and Medicaid, Medicare and patient fee payments. The Court of Claims has exclusive jurisdiction of issues as to the State's liability for tort and contract claims, whether the claims are asserted in an original action or by way of counter-claim . . . "since "[t]he State Department of Health is not a separate legal entity . . . but is a branch of the State Government . . . disputes with it with respect to fair compensation must be adjudicated in the Court of Claims (See Public Health Law, § 401)" (R-1067).

The Opinion went on to find that defendants had "bona fide issues to present to the Court of Claims" and to avoid practical problems and noting that the State was not being prejudiced in any way by the failure to

file in the Court of Claims, provided that upon a filing of Claims within thirty (30) days of the entry of the Order, the State would be estopped from moving to dismiss such Claims as being barred by the Statute of Limitations.

The Judgment was modified to delete all of the award to defendants except patient allowance, and Medicaid payments "all without prejudice to defendants pursuing their remaining claims in the Court of Claims as above indicated."

66. On November 29, 1979 the defendants, the Estate, filed a Notice of Appeal to the Court of Appeals (R-1055).

67. The Claims herein were filed with the Court of Claims and the Attorney General on November 30, 1979.

68. On January 7, 1980 by a notice of motion made returnable on January 21, 1980, the State sought to resettle the Court's Order (R-1069); Appeal No. 1, to make clear that the judgment is limited to the remaining assets of the Commissioner of Health's receivership, or that in the alternative, that permission be granted to appeal said provision to the Court of Appeals. (R-1069 *et seq.*)

69. On January 7, 1980 by a notice of motion made returnable on January 21, 1980 (R-1104) the State sought to resettle the Court's Order No. 502, Appeal No. 2, which affirmed the Order of the Supreme Court dated May 8, 1978 appointing the Commissioner as successor receiver, etc., "to provide that outside of the Court of Claims the liability of the People of the State of New York is limited to the extent of the remaining assets of the Commissioner of Health's receivership of Abbott Manor Nursing Home," or in the alternative, that leave be granted to appeal to the Court of Appeals (R-1108, 1109).

70. Opposition was heard to both motions to reconsider on the grounds that (a) each was time-barred; and (b) each was without merit (R-1125, 1126).

71. By Order entered February 8, 1980 the Appellate Division denied leave to reargue or Leave to Appeal in Appeals 501 and 502 (R-1210, 1212).

72. On December 18, 1980 in a Memorandum Decision, the Court of Appeals affirmed the Order of the Appellate Division for the reasons stated in the Opinion by Mr. Justice Witmer, 52 NY2d 766.

73. On December 20, 1978 the Estate sought and obtained a Temporary Restraining Order which, *inter alia*, enjoined the transfer of the remaining patients from Abbott Manor Nursing Home, except by voluntary means (Ex. 3 to State's Answering Affidavit).

74. Prior to August 16, 1979 all of the Abbott Manor Nursing Home was vacated of all patients (Kutzuba affidavit, par 64).

75. On September 13, 1979 the Supreme Court, per Justice Kane, over the objection of the Estate, ordered that ". . . the Plaintiff State of New York be relieved of any responsibility they may have for continued possession and maintenance, etc." of the Home, reserving to each side such rights as they might have against the other for damages.

—THE COURT'S DECISION—

1. *The Timeliness of the Claims*: In the course of its opinion, the Appellate Division stated that "to foreclose future legal proceedings on the question of notice of claim (Court of Claims Act, § 10, subd 4) we rule, *sua sponte*, that if the executors and other defendants choose to pursue such claim in the Court of Claims, they may file a notice thereof within thirty (30) days of the entry of the order hereon and the State will be estopped from moving

to dismiss as barred by the Statute of Limitations (see *Salesian Soc. v Village of Ellenville*, 41 NY2d 521; *Bender v New York City Health & Hosps. Corp.*, 38 NY 2d 662, Court of Claims Act, § 10, subd 6)."

In its memorandum of affirmance, the Court of Appeals wrote:

> "We note, however, that plaintiff has not attempted to appeal from the Appellate Division order insofar as it impliedly directs that the State be estopped from asserting defendants' noncompliance with the time limitations contained in subdivision 4 of Section 10 of the Court of Claims Act in any subsequent action brought by defendants against the State in the Court of Claims. Accordingly, we have no occasion to address the propriety of that aspect of the Appellate Division ruling." 52 NY2d, 766 at 768.

The State insists in its Brief in Opposition, Point III, and in the Kutzuba affidavit (pars. 46, 49, 50 and 51) that this Court lacks jurisdiction by reason of the failure of Claimants to comply with the statutorily imposed time requirements set forth in Sections 10 and 11 of the Court of Claims Act, citing *Lurie v State*, 73 AD2d 1006, 423 NYS2d 969, *Bommarito v State of New York*, 35 AD2d 458, 317 NYS2d 581.

To be sure, there is a well-recognized distinction between a statute of limitations and a notice of claim statute. (*Beary v City of Rye*, 44 NY2d 398 at 400.) Timely compliance with a notice of claim statute is not a plea in bar which must be raised by motion or answer, but is rather an essential part of Claimants' cause of action which must "be alleged and proved, like any other condition precedent to the existence of an obligation." (*Winter v City of Niagara Falls*, 190 NY 198, 203; *Camarella v East Irondequoit Central School System*, 41 AD2d 29, 4th Dept. affd 34 NY2d 139.)

Though the Appellate Division referred to the defense of the "Statute of Limitations" the Court of Appeals assumed the estoppel to refer to the time requirements set forth in Sections 10 and 11 of the Court of Claims Act.

Whatever may be the value of the distinction between a statute of limitations and a notice of claim statute in other contexts, it appears to this Court that the Appellate Division made no such distinction in this case, and treating them as similar (*Borgia v City of New York*, 12 NY2d 151, 155-156) held that Claimants' right to pursue their claims in the Court of Claims ought not to be defeated by the State's invocation of the defense of "time", however the defense was to be raised. The defense of lack of jurisdiction by reason of the alleged failure to comply with the notice requirements of the statute is therefore DENIED.

2. *The Scope of the Claims*: The State (par 47, 48 Kutzuba affidavit) urges that the single issue to be presented to this Court is the theory of fraudulent misrepresentation for the period of February 13, 1976 to October 20, 1976, the period from the date of death to the imposition of the receivership. This Court does not read Judge Witmer's Decision so narrowly. The reference in the decision to the Supreme Court's lack of jurisdiction "to determine the consequent issues as to who should bear the operating losses not governed by regulations for patient care allowances . . ." which are essentially "disputes with it [the State] with respect to fair compensation [which] must be adjudicated in the Court of Claims (see Public Health Law, § 401)", contains the instruction that Claimants' claims which were beyond the jurisdiction of the Supreme Court to resolve, were issues involving fair compensation, and could be brought before this Court on any theory sufficient to sustain them. The decision held that:

> "Such jurisdiction, however, did not authorize the court to determine the consequent issues as to who

should bear the operating losses not governed by regulations for patient care allowances and Medicaid, Medicare and patient fee payments. The Court of Claims has exclusive jurisdiction of issues as to the State's liability for tort and contract claims, whether the claims are asserted in an original action or by way of counterclaim (citations omitted). The State's sovereign immunity from suit has been waived only to the extent of permitting such claims to be adjudicated in the Court of Claims. (Citations omitted). The State's Department of Health is not a separate legal entity as are some State-created public corporations . . . (citations omitted). As such, disputes with it with respect to fair compensation must be adjudicated in the Court of Claims. 70 AD 2d at 439.

The Court also added:

> "Belated as is the State's argument of lack of jurisdiction, we cannot hold that it has waived the jurisdictional question, and *we conclude that the principal issues of defendants' claims must be litigated*, if at all, in the Court of Claims . . ." 70 AD2d at 440 [emphasis supplied]

And finally, the Court stated:

> "The judgment should, therefore, be modified to delete all of the award to defendants except item 3 thereof (patient allowances of $199) and item 7 (Medicaid, etc., payments of $29,650), totalling $29,849, plus appropriate interest, as to which the judgment should be affirmed, all without prejudice to defendants' pursuing their remaining claims in the Court of Claims as above indicated."
>
> 70 AD2d at 440 [emphasis supplied]

Having raised the issue, the State offers no reasoning as to why the Court would limit Claimants to a single issue of misrepresentation nor any argument to support

such a reading. No reason occurs to this Court as to why it should impose any such theory of limitation upon the Claimants' entitlement to be heard herein, upon any legally-sustainable theory for any damages sustained; and the Court so holds.

3. *The Motion for Summary Judgment in Claim No. 63694 (Covering the Pre-Receivership Period)*:

In support of their motions for summary judgment, Claimants contend that the essential facts of their applications for judgment are indisputable; they have been established under oath in prior judicial proceedings and were not disputed by the State.[65]

The "facts" upon which Claimants rely were set forth in various affidavits in opposition to the State's application for an injunction to enjoin the Estate (the Claimants here) from closing the Nursing Home, and in support of the Estate's cross-application for the appointment of a receiver as the appropriate remedy under the circumstances detailed herein. So far as this Court can determine, most of those "factual" allegations were not the subject of an evidentiary inquiry, were not deemed essential to the form of interlocutory remedy adopted, nor in the subsequent course of that litigation were they otherwise treated as necessarily dispositive. Thus though the "facts" in that proceeding were not there disputed, does not make them indisputable here.

The Court can surmise that the "factual" disagreements as to what was said at the various meetings arise not only from differing perceptions of verbal acts, but from the different perspective from which each side viewed its own legal position, and the effort to achieve a practical composition of the predicament. Be that as it may, this Court finds that there are triable issues of

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[65] Birnbaum Affidavit, par 3.

fact [66] and of causal relationship [67] which warrant a trial in Claim No. 63694 (CPLP. 3212 [b]).

The melancholy misadventures of the litigation, the denouement of which brings the matter to this Court [68] contains at least the caution that the positions of the parties be fully explicated.

4. *The Issue of Res Judicata and Its Application to Supreme Court's Order of May 8, 1978*: Much energy has been expended by the Claimants [69] in support of their argument that the doctrine of *res judicata* [70] should apply to the order of the Supreme Court dated May 8, 1978 (R-8) which order was unanimously affirmed by the Appellate Division (R-1059). Furthermore, the Court denied reargument or leave to appeal such affirmance to the Court of Appeals (R-1212).

The doctrine of *res judicata* has for its purpose the prevention of the relitigation of issues and to thereby achieve a final and binding determination with a minimum retracing of steps. It is doctrine of repose. *Eissing Chemical Company v Peoples National Bank of Brooklyn*, 205 App Div 89, 91; affd 237 NY 532. Here the Appellate Division, albeit with regret, clearly contemplated the relitigation of the "consequent issues as to who should bear the operating losses not governed by regulation for patient care . . .", and that "disputes with it [the De-

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[66] R-655, l 22-656, where Counsel anticipated this ruling.

[67] As in every litigation it must appear by the weight of the evidence that the defendant's actions are the cause of the damages to the Claimant.

[68] *State of New York v Abbott Manor Nursing Home*, 70 AD2d 434.

[69] And an equal amount has been expended by the State in opposition.

[70] The comments which follow apply to the related principles of "collateral estoppel" and "judicial estoppel" as well.

partment and thus the State] with respect to fair compensation must be adjudicated in the Court of Claims." (70 AD2d 434 at page 439) I find no contemplation of "repose" in the Court's decision.

It is unmistakably true that the portions of the Order of May 8, 1978 which appointed Robert F. Whalen as Commissioner to be the Receiver and which also ordered him to take "full responsibility for all operating and maintenance expenses during the period of his appointment" were never appealed. And if this Court were called upon to do so would be prepared to hold that the Supreme Court had jurisdiction to condition the grant of the extraordinary remedy of receivership, (the chosen means of responding to the State's insistence that the Nursing Home remain open,) upon the State's assuming the reciprocal obligation to be responsible for the operating and maintenance expenses incurred during that receivership. That is what I understand to be the holding in *Shang v Silvian*, 60 AD2d 473, 3d Dept 1977, app dsmd 45 NY2d 776 (1978). That is in essence the remedy imposed by the Appellate Division (R-728) when it conditioned the lifting of the vacatur from the appeal of the December 29, 1976 Order upon the arrangement for the payment of a sum of money sufficient to meet the operating expenses being incurred by the co-receivers (R-721, 722). And thus if there were here presented a claim that the Commissioner had refused to "take full responsibility for all operating and maintenance expenses" this Court would apply the doctrine of *res judicata*.

Claimants do not so confine their argument, nor so limit the reach of the application of the doctrine. Claimants would have this Court grant *res judicata* effect to that portion of the May 8, 1978 order which incorporated

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[71] There is a well-recognized conceptual difference between "operating losses" and "fair compensation". *United States v Pewee Coal Co. Inc.*, 341 US 114, 118.

by reference the money awards arrived at in the March 6, 1978 decision (R-32), viz., the monthly rental the inventory payment, etc. This Court simply is not persuaded that the Appellate Division, having adopted the Decision of Judge Witmer which carefully detailed the metes and bounds of the Trial Court's jurisdiction, would use that very Decision as the map for confirming the Trial Court's award of "fair compensation" issues—issues which the Decision had clearly placed outside the area of the Trial Court's jurisdiction.

Judge Witmer's decision, affirmed by the Court of Appeals, held that:

> "Such jurisdiction, however, did not authorize the Court to determine the consequent issues as to who should bear the operating losses not governed by regulations for patient care allowances and Medicaid, Medicare and patient fee payments. . . . disputes with it with respect to fair compensation must be adjudicated in the Court of Claims." (70 AD2d 434 at pg 439)

This Court understands the decision to mean (1) that items of fair monthly rental, taxes, inventory adjustments, etc. are matters included within the concept of "fair compensation" and (2) the Supreme Court had no jurisdiction to decide the dispute as to "fair compensation". A Judgment rendered without jurisdiction is void and unenforceable. *Matter of Baltimore Mail S.S. Co. v Fawcett*, 269 NY 379 at 388. *O'Donoghue v Boies*, 159 NY 87 at 98-99, citing *Ferguson v Crawford*, 70 NY 253, and quoting the statement of Judge Andrews in the case of *Risley v Phenix Bank*, 83 NY 318 at 337, 338, which statement, *mutatis mutandis*, is particularly apposite to the case at bar:

> "[B]ut a Court authorized by statute to entertain jurisdiction in a particular case only, if it undertakes to exercise the power and jurisdiction con-

> ferred in a case to which the statute has no application, acquires no jurisdiction, and its judgment is a nullity, and will so be treated when it comes in question, either directly or collaterally."

Thus, the want of jurisdiction to render a particular judgment may always be asserted and raised directly or collaterally. *O'Donoghue v Boies, supra.*

True it is that Judge Kasler clearly contemplated and expressly stated that:

> "Inherent in that order was the proposition that the State must bear the full legal and financial responsibility . . . (I)t would be unconscionable that this [receivership] should have to be accomplished as the result of a virtual confiscation of private property." (R-33, R-34) [parenthetical material added]

There can be no dispute from the quoted language nor from any review of the record that Judge Kasler believed, as indeed the State led him to believe,[72] that he had jurisdiction to condition the grant of the remedy upon the State's assumption of at least some financial obligations. But a mistake of law as to the Court's authority, unlike a mistake of fact upon which authority rests, does not confer jurisdiction: *O'Donoghue v Boies, supra,* at pg 99.

If *Shang v Silvian, supra,* has a broader reach than accorded it here, and Claimants stoutly maintain that it has, such extension must await the decision of another day. As this Court understands the present posture of this case, it is that in the absence of a statute, the Supreme Court could use its equitable power to impose a Receivership as the most practical means of responding to the State's insistence that the Nursing Home remain operative; and by the exercise of that same equitable power and in order to preserve the *status quo,* to impose

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[72] R-145, 146, 156, 157, 158, 667.

the reciprocal obligation on the State to pay the operating and maintenance expenses necessary to continue the operation of the Nursing Home. But it was decided that the Supreme Court lacked the further equitable power to determine whether the State was obliged to undertake responsibility for any further consequential damages by reason of the imposition of that Receivership and if so the amount thereof. Perhaps it is a paradox to state that the Trial Court possessed the equitable power in the absence of statutory authority;[73] to impose a Receivership to require the continued operation of the Nursing Home, but lacked the equitable power to supply the correlative remedies. But if paradox there be, it arises from the circumstance that in the absence of statutory authority, the assumption of equitable power to adapt the remedies in the manner and to the extent the Trial Court would have applied them, i.e., the appropriateness and amount of "fair compensation", collides with the positive enactments of constitutional dimension relative to the manner and extent to which the State has waived its immunity from suit with respect to such issues. 70 AD2d 434.

The foregoing serves as the reasoning for this Court's unwillingness to accord *res judicata* effect to that portion of the May 8, 1978 order which awarded money damages as to items and in amounts that were not approved in Judge Witmer's decision.

5. *The Applicability of Regulations 10 NYCRR 701.3 (f) and 401.3(f) to the Determination of this Case*:

Central to the State's defense of both of these claims is the contention that it was justified in exercising its "police power" by the authority found in 10 NYCRR 701.3(f) and 401.3(f); thus it asserts in its Brief in Opposition (pgs 5-7) as follows:

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[73] In the case of the death of a licensed operator.

> ". . . on September 5, 1976, the State secured a temporary restraining order preventing the precipitous closing of Abbott Manor until claimants had complied with 10 NYCRR 701.3(f) and 401.3(f). These regulations require that before any nursing home in the State of New York is closed and patients transferred, the Commissioner of Health must first approve the facility's plan of closure and transfer of patients . . ."

After quoting the regulation and its "unquestionable" application and "indisputable" meaning, we are told:

> "Had claimants complied with the above-cited regulations, and submitted an acceptable plan of closure, they could have terminated the operation of Abbott Manor within 90 days of notification of closure with the permission of the Commissioner."

Further (Brief in Opposition, pg 32) we are told:

> "Its [the State's] position has been consistent: (a) before it could close, the Home must give notice to and obtain permission from the State, ..." (parenthetical material added)

This same argument as to the controlling force of the Regulation,[74] the failure of the Executors to comply therewith and to avail themselves of its provisions is repeated in whole or in part in the State's Supplemental Brief in Opposition at pages 12, 13, 14, 15, 19 and 23. Given this clear and repeated categorical assertion of the dispositive effect of the Regulations, of the State's reliance thereon as authority and justification for its actions throughout, and of the alleged failure of the Executors to avail themselves of the asserted powers of dis-

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[74] If there is a difference between the two Regulations no such distinction is made in this decision, and the further references to "the Regulation" includes both.

pensation reposing in the Commissioner, separate treatment and discussion is warranted.

It is this Court's opinion that the Regulation cited can have no controlling impact on this case and that therefore the State's reliance thereon is misplaced and unavailing.

In the first place we know that under Section 1 of Article 3 of the New York Constitution that "The legislative power of this State [is] vested in the Senate and Assembly", and that this legislative power cannot be delegated to others. *Darweger v Staats*, 267 NY 290; *Levine v O'Connell*, 275 AD 217; affd 300 NY 658. *Little v Young*, 274 AD 1065, affd 299 NY 699. We know further that there was no statutory provision covering the situation in this case where a licensed operator of a nursing home died (70 AD2d 434). Thus the Regulations upon which the State relied and relies cannot supply that legislative void without contravening Section 1 of Article 3 of the New York State Constitution. To state the matter differently, Section 10 NYCRR 401.3 (f) or 701.3(f) could not have the application for which the State contends, for that would result in a Rule or Regulation bespeaking a legislative policy or effectuating a statute—a statute which simply does not exist. *Darweger v Staats*, 267 NY 290; *Packer Collegiate Institute v University of State of New York*, 298 NY 184. The concern for legislative rather than regulatory action is particularly significant where the State's exercise of power is in the sensitive area of the citizens' right of private property, or the citizens' right to be in business or go out of business. *Matter of Seignious v Rice*, 273 NY 44 *Packer Collegiate Institute v University of State of New York, supra.*

In the second place, the State's reliance on the Regulations is misplaced for the reason that a reading of the Regulation on its face reveals that it applies to and pre-

supposes the evidence of a licensed operator. The Regulation(s) reads as follows:

> "No medical facility shall discontinue operation or surrender its operating certificate unless 90 days notice of its intention to do so is given to the Commissioner and his written approval [is] obtained."

The State in its brief (pg 6) states "Unquestionably [the Regulation(s)] were applicable to Abbott Manor Nursing Home and to claimants who were the parties in charge of it and responsible for its operations." After quoting the regulation the State argues (*ibid*) "By the use of the words '[n]o medical facility', the regulation applies to any persons in control of the operation of a nursing home." But the synecdoche "no medical facility" can only logically and contextually mean that *"no licensed operator of a medical facility* shall discontinue operation and no licensed operator shall surrender its operating certificate, etc." Not only does a fair reading and common sense tell us that the Regulation has no application to the type of case at hand, but its location in Title 10, part 401 under the rubric "ALL FACILITIES—Operating Certificates" confirms that conclusion. The sections and subsections deal with the "Issuance of operating certificates" (401.1), the "Limitation of Operating Certificates" (401.2), "Changes in existing medical facilities" (401.3) and "Review of operating certificate determinations" (401.4). Section 401.3 deals with physical changes in the medical facility, increases or decreases in its usage, changes the title, etc. and the discontinuance of operation (401.3 [f] and [h]), but it does not deal with the duties of "successor operator", whether they succeed by law or regulation. In short, the entire statutory scheme presupposes that only "licensed" operators will run nursing homes. It would contradict the text and the context to argue that the regulation means that an unlicensed operator could continue in business by not complying with the regulation.

The argument contained in Mr. Jasinski's affidavit that Section 401.4 (c), (which does at least specifically deal with the death of a licensed operator) would give the Commissioner a kind of administrative wild card which he could play or not as his sole discretion decides—is a construction that is supported neither by a reading of the Regulation nor, I think, the more conventional notions of constitutional processes for the enactment of laws, regard for private property and the freedom to enter or leave an occupation. In this Court's opinion, from a fair reading of the section, it empowers the Commissioner to respond to a request to extend the expiration date of an operating certificate of a "partnership to whom the operating certificate has been issued" upon the death of a person, party or member thereof, and does not grant him the power to impose such continuation by fiat.

In the third place, Regulation 401.3 (f) contains no normative principle by which "[the] written approval [of the Commissioner] [is] obtained." The manner in which the State repeats that alleged failure of the Executors to submit a "90 days' notice of its intention to do so [close]" seems to radiate the implication without stating it, that the "with approval" of the Commissioner would be forthcoming within that period. But the State itself asserts, in other contexts, that what the section really contains is the requirement "that before any nursing home in the State of New York is closed and patients transferred, the Commissioner of Health must first approve the facility's plan of closure and transfer of patients." (State's Brief in Opposition, pgs 5-6). Since there were no available alternate facilities to which the patients could be transferred in the three-year period of the receivership, it is idle and disingenuous for the State to repeat its insistence that

> "Had claimants complied with the above-cited regulations and submitted an acceptable plan of closure,

> they could have terminated the operation of Abbott Manor with 90 days of notification of closure with the permission of the Commissioner." [75]

To insist, therefore, that this Regulation means what the Attorney General says it means, and to apply such Regulation to this situation brings it into confrontation with an unbroken line of authority which holds that even where there has been a delegation of rule making power to implement the expressed statutory policy to be applied, the regulations themselves must contain objective standards by which the Commissioner's "permission" is to be measured. *Levine v Whalen*, 50 AD2d 503, affd 39 NY2d 510, 518-519.

The pervasive regulatory schemes of the Federal and State Governments and the powers that its administrators accrue thereunder have their proponents and critics. Still, the most devoted proponent of the regulatory system's capacity to produce the good life could not defend the constitutionality of a regulation that says that a citizen can't go out of a business that his ancestor was in, until the Commissioner gives his permission—a permission that he may withhold in his unfettered discretion for any period of time regardless of the losses being suffered or the qualifications, ability, or the desire of the Heirs to conduct that business. *Friedstrass v Livingston*, 185 NYS2d 39 at 40; affd 8 AD2d 780; *Matter of Kosoff (Jones)*, 276 App. Div 621; affd 303 NY 663; *United States v General Motors Corp.*, 323 US 373 at 377-378; cf. *Loab Estates, Inc. v Druhe*, 300 NY 176.

6. *The Issues Arising From the Imposition of the Receivership and the Appropriateness of Summary Judgment to Answer Them:* From that point in time when the State applied for an Order to Show Cause and ancillary thereto obtained a temporary restraining order in

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[75] Brief in Opposition, pgs 6-7.

September, 1976 (R-44) until the Supreme Court issued an Order directing the Commissioner to deliver the possession of the Nursing Home to the Estate as of September 14, 1979 (the period covered by Claim Number 63695), Claimants insist that the facts are not disputed and indeed are indisputable. The State, for its part, doesn't point to any such issues of fact covering that period. Since there is a Record consisting of Pleadings, arguments, testimony and findings, this Court has determined that there are no issues of fact and finds it appropriate therefore to address the several legal issues raised by the parties by means of summary judgment.

The State in its Brief argues that the only action taken by the State was to obtain an injunction to prevent the closing of the Home and to compel the executors of the Estate to comply with the Regulation, and that "Had Claimants complied with the above cited regulations, and submitted an acceptable plan of closure, they could have terminated the operation of the Abbott Manor within 90 days of notification of closure with the permission of the Commissioner" (Brief in Opposition, pgs 6 & 7). This argument previously dealt with herein, is then repeatedly coupled with the contention that the imposition of the Receivership was the Claimants' idea, and having procured that form of relief from the Court, they can't be heard to complain that the imposition of the Receivership constituted "a taking" or an "appropriation by the State". (State's Brief in Opposition, pg 19, 20; Supplemental Brief, pg 12, 13, 14, 15, 21, 22, 23, 24.) While it is true that the Claimants in their answer and counterclaim to the State's action sought a Receivership, it is also true that this remedial solution was the result of an agreement (R-103) and, what is even plainer, it was the only practical accommodation which could be made between the State's insistence that the Home remain operative, and the Executors' insistence that they were not "licensed to operate", were "unlicensable", and unable and unwilling to run a nursing home, particularly one

that was losing significant sums of money. Whatever may be said for the constitutionality of the issuance of an injunction to compel the Executors of the Estate of deceased operators to continue to operate a home and do so at a loss until the Commissioner gave them permission to close, surely it would be an extraordinary and unprecedented application of that equitable remedy. In a proper case upon a proper showing, the Attorney General has persuaded the courts to interfere with a business or occupation to the extent of issuing a prohibitive injunction, however reluctantly, to the extent of enjoining the unlicensed practice of a licensable occupation or profession.[76] But no case has been cited nor can research uncover the case where a Court has issued an injunction mandatory in effect, to require the continuation of the unlicensed practice of an occupation. In *Loab Estates v Druhe*, 300 NY 176 at 180, the Court upheld a regulation issued pursuant to the wartime rent control statutes which prohibited the owner from withdrawing commercial property from the rental market unless the landlord relocated the tenants in comparable quarters at comparable rents. But in that case, unlike the case at bar, we note that "Appellant does not contend that it has been deprived of a reasonable rental upon its property. (See *Bowles v Willingham*, 321 US 503 at 517.) Nor has it challenge the existence of an emergency." 300 NY 176 at 180. *Loab Estates*, like *Block v Hirsh*, 256 US 135, upon which it relies, were enacted to prevent exploitation of renters by reason of the suspension of the law of supply and demand in the real estate market occasioned by the demands of the war effort. In *Pennsylvania Coal Co. v Mahon*, 260 US 393 at 416, Mr. Justice Holmes in his decision noted that *Block v Hirsh, supra*, and other cases dealing with housing congestion caused by the war ". . . went to the verge of the law." Without undertaking to reconcile the landlord-tenant line of cases in a

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[76] *People ex rel Bennett v Laman*, 277 NY 368.

wartime setting, it is sufficient to distinguish them from the present case to note that the statutes that authorized the restraint in a non-licensed enterprise applied to the regulation of an entire rental market and thus had a much wider application necessarily than the regulation of nursing homes to which some superannuated people repair; but more decisively that same statute that authorized the restriction, guaranteed the owner a "fair return" on his property. *Loab Estates v Druhe, supra; Bowles v Willingham, supra; Pennsylvania Coal Co. v Mahon, supra.* If such statutes "went to the verge of the law" then the regulatory scheme as envisioned by the Department of Health here and urged upon this Court by the Attorney General, would take us considerably beyond the traditional boundaries of the law. This Court declines to travel that distance, and therefore rejects the argument.

Thus the State's argument that the Executors initiated the idea of a receivership places more weight on that circumstance than its foundation will bear. In the first place, the Supreme Court refused to issue an injunction.[77] Second, the Supreme Court in imposing a receivership, acted in response to the State's initiative to keep the Nursing Home operative (R-108). Thirdly, Judge Witmer's decision holds that:

> "We believe that in the circumstances of this case, absent specific statutory authority (see Public Health Law § 2810). Trial Term properly assumed jurisdiction to exercise its equitable powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients. . . ." (citations omitted) 70 AD2d 434 at 438

Having invoked the jurisdiction of the Court, and having obtained the relief it desired, it seems idle to this Court

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[77] R-117. Section 2801-C clearly does not apply, because clearly there was no violation of any provision of the Article. There was "no provision" to violate, and no regulation could or did exist.

to base an argument predicated upon who suggested to the Trial Court the proper form of the relief granted in the exercise of that jurisdiction.

We turn then to the central issue presented in the application for summary judgment in Claim Number 63695, viz.: Whether Claimants are entitled to judgment in their favor for the period covering the Receivership (October 20, 1976 to September 1, 1979) and if so, in what amount.

In answering that question the Court's decision is premised on the facts of this case which have been laboriously restated and to which here only a brief allusion need be made. The Executors had made it clear by letter that they did not desire to continue the operation of the Nursing Home, and even more clearly that they did not, and would not continue to do so at a loss. The State insisted that the Home remain operative regardless of the loss, on the State's payment terms, premised on the State's view that the Hospital Code required that result (R-479-81).

The State's insistence, while premised on a supposed regulation, the prime motivation for the continued operation of the Home is stated with commendable candor by Assistant Attorney General Wolfgang (R-479):

> ". . . However, sir, the question arises that upon termination of the receivership the *ownership and operation* of that *reverts* to the estate . . . and the estate . . . is going to close the home and then a lot of those patients will be transferred to hospitals at a *hundred dollars a day instead of thirty-two or whatever the rate is* . . . ." [emphasis supplied]

The attorney for the Executors expressed a willingness to keep the Home open for an additional ninety (90) days. Nothing was made of that offer by the State save its unswerving insistence that the Executors had to comply with the Regulations as interpreted and applied by

the State. That the Estate was suffering a significant operating loss is not denied—indeed it is admitted. That the Receivers could not sustain the operation of the home unless Medicaid payments were increased, which was only done at the insistence of Justice Dillon and the Appellate Division, is undeniable and undenied. This decision, therefore, takes the facts of this case as they undisputably appear, based on the state of the law as it then existed.

Article I, § 7 of the Constitution of the State of New York proclaims an essential proposition of a free society:

> "Private property shall not be taken for public use without just compensation." [78]

We take it as decided in this case that the imposition of the receivership was a proper exercise of the Court's equity jurisdiction—thus a proper exercise of the police power to prevent danger to the health of the patients in the Nursing Home. 70 AD2d 434; *People ex rel Bennett v Laman*, 277 NY 368 at 384. Though a state action may be indisputably within the State's police power: "It is a separate question, however, whether an otherwise valid regulation, so frustrates property rights that compensation must be paid. *Loretto v Teleprompter Manhattan CATV Corp.*, dec June 30, 1982, —— US ——; 50 LW 4988 at 4989. In distilling the teaching of *Penn Central Transportation Co. v New York City*, 438 US 104 (1978), the Court noted that there is no "set formula" to determine whether compensation is constitutionally due for a government restriction of the use of property, but that ". . . the inquiry is not standardless;" And "A taking may more readily be found when the interference

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[78] See R-479 at pg 31-32 supra: "We assume . . . that an exigency exists that would warrant the exercise of eminent domain. But the question at bottom is upon whom the loss . . . should fall." *Pennsylvania Coal Co. v Mahon*, 260 US 393 at 416; *Monongahela Navigation Co. v United States*, 148 US 312 at 325; *Armstrong v United States*, 364 US 40 at 49.

with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Loretto, supra*, —— US ——, 50 LW at page 4990.

The Court in *Loretto, supra*, also disposed of the argument that the reference in *Penn Central* to a physical invasion "by government", 438 US at 124, indicates that a different result should obtain where the invasion is accomplished by a private person by stating, "We disagree. A permanent physical occupation authorized by state law is a taking without regard to whether the State, or instead a party authorized by the State, is the occupant. See eg. *Pumpelly v Green Bay Company*, 13 Wall. 166 (1871) . . . " *Loretto v Teleprompter Manhattan CATV Corp.*, —— US ——, 50 LW at 4991, (fn. 9).

We are instructed that in measuring Governmental action against the stricture of the Fifth Amendment to the United States Constitution, that "[t]he critical terms are 'property', 'taken' and 'just compensation'." *United States v General Motors*, 323 US 373, 377-378, 65 S Ct. 357, 359, and that the construction given to "property" is in

> ". . . a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it. . . . When the sovereign exercises the power of eminent domain it substitutes itself in relation to the physical thing in question in place of him who formerly bore the relation to that thing, which we denominate ownership. . . . Governmental action short of acquisition of title or occupancy has been held, if its effects are so complete as to deprive the owner of all or most of his interest in the subject matter, to amount to a taking." 323 US at 378.

That Claimants had a "property" interest that was affected cannot be disputed.

In its determination of whether "a taking" occurred, the Court has reviewed the "noxious use" line of cases where a prohibition against a use of property that would be injurious to the health, morals or safety of a community are found to be non-compensable exercises of the sovereign's police power (*Mugler v Kansas*, 123 US 623 and the cases collated and discussed in Justice Rehnquist's dissenting opinion in the *Penn Central* case, 438 US 104 at 144). Consideration was also given to the "non-injurious" line of cases, of which "zoning regulations" which limit the uses to which property may be put are the most typical, and where in that line the *Penn Central* case may be found. But it would be perilous for this Court to undertake a synthesis of the principles expressed in those cases, or to take language from them which have their own context, and to apply and adapt them to the circumstances of this case. The Court seriously considered the structural approach suggested by a determination of whether the sovereign's action in restricting the use of the property was that of an "arbitrator" or of an "entrepreneur".[79] Though each approach would yield the same result, it seems to this Court that the most analogous line of cases is found in the "wartime seizure" cases (*United States v Pewee Coal Co., Inc.*, 341 US 114 [1951] which supply principles and authority of more direct application requiring little or no interpolation in the determination of whether a "taking" occurred. They involve an exercise of the sovereign power to compel an owner to continue to operate a business for a temporary period under the nominal authority of a Governmental official.

Pewee Coal Co., Inc., supra, was ". . . a coal mine operator whose property was [allegedly possessed] and operated by the United States from May 1 to October 12,

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[79] *Lutheran Church in America v City of New York*, 35 NY2d 121, 128-129; *Fred F. French Inv. Co. v City of New York*, 39 NY2d 587, 593-594.

1943, to avert a nationwide strike of miners." The action arose out of an Executive Order issued by the President ". . . directing the Secretary of Interior '. . . to take immediate possession, so far as may be necessary or desirable, of any and all mines producing coal in which a strike or stoppage has occurred or is threatened . . . and to operate or arrange for the operation of such mines . . .'" The Court in holding that there was "a taking" followed its decision in *United States v United Mine Works*, 330 US 258.

I find in Mr. Justice Reed's concurring opinion [80] in the *Pewee Coal Co.* case an illuminating instruction on the issue of "temporary takings". Upon the facts recited he ". . . agree[d] that in this case there was a 'taking' by eminent domain that requires the Government to pay just compensation to the owner of the property for its use . . ." [81]

> "This is a temporary taking. The relatively new technique of temporary taking by eminent domain is a most useful administrative device: many properties, such as laundries, or coal mines, or railroads, may be subjected to public operation only . . . to meet war or emergency needs, and can then be returned to their owners. . . ."

Justice Reed then noted:

> "Temporary takings can assume various forms. There may be a taking in which the owners are ousted from operation, their business suspended and the property devoted to new uses. *United States v General Motors Corp., supra.* . . . A second kind of taking is where, as here, the Government for public

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[80] 341 US 114 at 119, *et seq.*

[81] There was no dispute from anyone on the Court that "a taking" occurred. The only issue was whether the Goverment had to bear the "operating loss" of a firm that was losing money before the taking.

> safety or the protection of the public welfare, 'takes' the property in the sense of assuming the responsibility of its direction and employment for national purposes, leaving the actual operations in the hands of its owners as government officials appointed to conduct its affairs with the assets and equipment of the controlled company." [82]

It is within that structural framework that I analyze and decide this case. I find that the imposition of the Receivership, a possessory remedy, by the Supreme Court of the State of New York as the remedial device to respond to the State's insistence that the Abbott Manor Nursing Home remain operative, the substantive terms of that receivership being adopted from the provisions of Section 2810 of the Public Health Law, constituted a "temporary taking" which "requires the Government to pay fair compensation to the owner of the property for its use". Stated differently, it is my opinion that the imposition of the receivership [83] as the means to force the continued operation of the Abbott Manor Nursing Home falls squarely within the "second kind of taking" described above.

I base my opinion that "a taking" occurred on what I perceive to be a factual and legal similarity to the authorities cited, as well as my inability to apprehend any other reasonable conclusion to be applied to the deprivation of the owners' right to use or dispose of their property (*United States v General Motors, supra,*) and particularly the right to discontinue a use devoted to a losing venture where the State established and controlled the payment mechanism which occasioned the loss in-

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[82] 341 US 114 at 120.

[83] The remedy in *Pewee Coal Co.* and *United States v. United Mine Workers, supra.*, are essentially mandatory injunctions in benign form and produce no different constitutional results than if a receivership has been established.

curred in the operation. I decline to apply or follow the case of *Davidson v Commonwealth*, 395 NE2d 1314.

The State's repeated insistence that the Medicaid reimbursement scheme and its adherence thereto as completely dispositive of this litigation is advanced with a vertiginuous circularity. The Medicaid reimbursement rate, we are told [84] provides for the "reimbursement of costs reasonably related to the efficient production of services". The alleged mischief that Executors were about was their effort to pressure the State into a higher reimbursement rate than the deceased operator had regardless of how excessive or unreasonable the costs may have been. The inefficiencies of the Executors and the excessiveness or unreasonableness of the costs are then proved by the fact that they were losing money under the Medicaid reimbursement system.[85]

We are told further (Brief in Opposition, pg. 23-24):

> ". . . the state merely saw to it that the facility remained in operation;[86] to the extent [that] the facility lost money subsequent to the state action,[87] it merely continued its record of financial woe dating back to well before the state's involvement in the facility's affairs.
>
> "The fact that the facility is losing money now [meaning "then"] [88] and has lost money for many

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[84] Brief in Opposition, pg 4.

[85] Although the real root of their operating loss is alleged to have laid in their failure to hire enough people (See Dr. Cicero's letter, Ex. *E*). The Receivers also were unable to meet operating expenses much less achieve a return.

[86] And see Brief in Opposition, pg 31, 32; and Supplemental Brief at pgs. 13, 14, 15, 17, 18, 19.

[87] *United States v Pewee Coal Co., supra.*

[88] *Ibid.*

> years does not change the essential character of the state action, which was merely to protect the interests of the patients."[89] (parenthetical material added)

I do not agree. The Supreme Court in *Penn Central*, 438 US 104 at 129 (fn. 26) and further at 438 US 104 at 136 stated its constitutional premise in clear language:

> "More importantly, on this record, we must regard the New York City law as permitting Penn Central not only to profit from the Terminal but also to obtain a 'reasonable return' on its investment."

And again, 438 US 104 at 138 (fn. 36) it renewed that basis:

> "We emphasize that our holding today is on the present record, which in turn is based on Penn Central's present ability to use the Terminal for its intended purpose and in a gainful fashion. The city conceded at oral argument that appellants can demonstrate at some point in the future that circumstances have so changed that the Terminal ceases to be 'economically viable' appellants may obtain relief."

The short answer to the State's argument is that "Medicaid Payments" did not cover the "operating expenses". Secondly we are not here concerned with "operating expenses" and whether the Commissioner of Health complied with the applicable payment statute; for the purposes of this Decision I assume that he did. I do observe that the contention that a state can, by the exercise of its police power, not only require the continuation of a licensed occupation, and at a loss, according to payment terms established by the State, strikes me as an extraordinary proposition, unsupported by any authority

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[89] The argument was lifted in the same language from the State's Brief on Appeal.

and contrary to the holding in *United States v Pewee Coal Co., supra.* But the issue before this Court is not whether the Claimants are entitled to an operating profit, but whether they can obtain a reasonable return on the investment in the property. *Penn Central Transportation Co.*, 438 US at 137; *United States v Pewee Coal Co., Inc.*, 341 US at 117-118.

The argument that the Medicaid payments are the extent of the State's obligation because the Legislature said so, is an argument that runs contrary to the instruction found in *Monongahela Navigation Co. v United States*, 148 US 312 at 327:

> "The legislature may determine what private property is needed for public purposes—that is a question of a political and legislative character: but when the taking has been ordered, then the question of compensation is judicial. It does not rest with the public, taking the property, through Congress or the legislature, its representative, to say what compensation shall be paid, or even what shall be the rule of compensation. The Constitution has declared that just compensation shall be paid, and the ascertainment of that is a judicial inquiry."

"Just" or "Fair Compensation" for the use of property may be measured by a "fair" monthly rental for the facility "to be paid for each month the receivership remains in effect" as well as "compensation for any property used" by the Receivers. That much as least appears from a reading of § 2810 of the Public Health Law, and were the principle items of damage adapted to the facts and findings by the Supreme Court, the items found to be included within the concept of "fair compensation" and thus beyond the jurisdiction of that Court.

Here the amount of "fair monthly rental" was a rather modest amount established by the State's own expert (R-667, l 7, *et seq.*). The amount of the "fair monthly

rental" for the property is fixed at $7,500.00, for an aggregate sum of $262,500.00 for the period of October 20, 1976 to September 14, 1979, an amount with which the State had no quarrel then, nor can there be now.

It is clear to me that the "fair monthly rental" figure established by the State's expert was premised on a "net net" lease. ". . . you considered the arrangement to be what is called a net net lease, did you not? A. Oh, yes, yes." (R-541). And that the ". . . tenant or occupant of the premises would pay insurance, all real estate taxes, whatever they might be, maintenance expenses for . . . [the] operation of the facility . . .?" (R-542). The Real Estate taxes for the period of $142,365.00 are likewise undisputed.

The Workmans Compensation and other insurance for hazard, mortgage, etc. in the combined amount of $26,861.00 are likewise established and undisputed.

Payroll payments for the week ended October 23, 1978 in the amount of $5,545.00 and for the week ended October 29, 1976 in the amount of $8,333.00, as well as Bookkeeping Service and an educational fee incurred by the Receivers as well as interest on a loan of money advanced, are all simply items of expense chargeable to the Receivers for which the Estate (Claimants) are entitled to reimbursement, and I so find.

As to those items and the accompanying interest due the State raised no dispute[90] a special objection is raised, however, to the valuation of the amount of Inventory left in the premises, fixed by stipulation in the amount of $48,094.91. If I understand the State's argument with respect to that item of recovery, it is: (1) that the State has already paid for the items by means of the Medicaid formula, an argument which I reject; and (2) that the State returned many of the items for which it is entitled to a set-off—an argument which if borne out by the facts,

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[90] Except, of course, to the appropriateness of any payment.

is entitled to consideration. The Court finds the Inventory valuation figure to be $46,094.91, but gives the State the opportunity to submit its experts' opinion of the value of the Inventory returned and the Court will give consideration to arguments for a reduction in the amount.

THE FOREGOING CONSTITUTES THE DECISION OF THIS COURT. AN ORDER OF SUMMARY JUDGMENT, WITH INTEREST THEREON AT THE RATE OF SIX PERCENT (6%) SHOULD BE SUBMITTED IN CONFORMANCE THEREWITH.

DATED: Buffalo, New York,
August 23, 1982

/s/ Thomas P. McMahon
THOMAS P. MCMAHON
Judge of the Court of Claims

APPENDIX K

COURT OF APPEALS OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

v.

ABBOTT MANOR NURSING HOME *et al.*,
Appellants, et al., Defendants.

Dec. 18, 1980

OPINION OF THE COURT

MEMORANDUM.

The order of the Appellate Division should be affirmed, with costs, for the reasons stated in the opinion by Mr. Justice G. ROBERT WITMER (70 A.D.2d 434, 421 N.Y.S.2d 451).

We note, however, that plaintiff has not attempted to appeal from the Appellate Division order insofar as it impliedly directs that the State be estopped from asserting defendants' noncompliance with the time limitations contained in subdivision 4 of section 10 of the Court of Claims Act in any subsequent action brought by defendants against the State in the Court of Claims. Accordingly, we have no occasion to address the propriety of that aspect of the Appellate Division ruling.

COOKE, C. J., and JASEN, GABRIELLI, JONES, WACHTLER, FUCHSBERG and MEYER, JJ., concur.

Order affirmed, with costs, in a memorandum.

APPENDIX L

SUPREME COURT
STATE OF NEW YORK
Appellate Division
Fourth Department

#501-503/1979

PEOPLE OF THE STATE OF NEW YORK,
Appellant,

vs.

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM and MIRIAM WOLFF,
Respondents.

ARGUED: September 5, 1979

DECIDED: November 2, 1979

PRESENT:

HON. MICHAEL F. DILLON, Presiding Justice
HON. RICHARD J. CARDAMONE,
HON. RICHARD D. SIMONS,
HON. JOHN J. CALLAHAN,
HON. G. ROBERT WITMER, Associate Justices

501—Appeal from Order and Judgment of Erie Supreme Court—Kasler, J.—Reimburse estate.

502—Appeal from Order of Erie Supreme Court—Kasler, J.—Appoint receiver.

503—Appeal from Order of Erie Supreme Court—Kasler, J.—Reimburse receivers.

APPEARANCES:

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(Norman Greene, Esq., of counsel)

OPINION

WITMER, J.

The proponents of court unification may well use this case as an argument in support of their efforts. Among the many issues presented herein, the principal one is that of jurisdiction. Because the Supreme Court does not have jurisdiction of claims against the State of New York, we modify the judgment from which the State appeals.

Abbott Manor Nursing Home (the Home), one of the defendants herein, was owned by Bernard F. Birnbaum to whom the State had issued a license for its operation. He died on February 13, 1976. The executors of his will, having no license to continue operating the Home nor authority from the Surrogate to do so, sought to close it. After some unfruitful negotiations with the State Department of Health the executors notified the patients of the Home and their responsible relatives in August 1976 that the Home would soon be closed and that they should arrange to move out. Apparently because other facilities

for the patients of the Home were not available, the State instituted an action against the executors for an order enjoining them from closing the facility. The executors interposed an answer in which they asked the court (1) to appoint a receiver to operate the Home to protect the patients therein and the interests of the Birnbaum estate, because of the failure of the State Department of Health to agree upon a receivership under section 2810 of the Public Health Law (and see Social Services Law, § 461-f), (2) for a judgment declaring that the duty of the Home to continue operation ceased on the death of the owner-licensee on February 13, 1976 and that from that date onward the executors have continued the operation of the Home at the insistence of the State Department of Health and (3) that, therefore, the estate is entitled to be compensated for its actual costs for providing the services for the patients therein until it be permitted to close, and that the court should award it damages in payment thereof. The executors seek not only the fair rental value of the facility since the death of their testator but the inventory value of the personal property used in its continued operation and also recovery of the losses sustained by the Home in such operation.

As of October 20, 1976 the court appointed two longtime employees of the Home as co-receivers thereof, with powers of receivers appointed under section 2810 of the Public Health Law. In doing this the court stated that it was exercising its equitable powers and recognized that the statutes do not provide for a receivership when a licensed operator dies. The court denied the State's application for an injunction against defendants' closing the Home, the directions to the receivers making an injunction unnecessary. The court also denied for 90 days the executors' request for a hearing to determine the fair rental value of the facility and the value of the inventory used in its continued operation, with the con-

dition that if the Commissioner of Health should fail to compensate the estate for its actual operating costs, including rental value and value of the inventory, the executors could re-apply for a hearing with respect thereto. The order also denied the executors' application for payment to the estate of certain Medicaid, Medicare and other payments for October 1976; the court recognized therein that such funds belong to the estate, but it authorized the receivers to use them, subject to a hearing after 90 days with respect to them and other items in the executors' counterclaims.

When the Commissioner denied the executors' claims, the executors and receivers in December 1976 moved for a hearing for determination of the compensation to be paid to them by the Department of Health during the receivership, and for an accounting by the receivers. The court then conducted an extensive hearing thereon, and on December 29, 1976 it ruled that the Commissioner must pay to the receivers the actual costs of operating the Home, including a fair rental for the facility and the value of the inventory. The State's prompt appeal from that order stayed its operation (CPLR 5519, subd (a) par 1). Nevertheless, the receivers continued to operate the Home. More than a year later the executors and receivers moved to vacate the automatic stay, and it was vacated. Still the Commissioner failed to obey the court's order.

In April 1978 defendants moved to compel the Commissioner to comply with the order of December 29, 1976, and the court held a lengthy hearing thereon. It then terminated the prior receivership and appointed the State Commissioner of Health as receiver and directed him to comply with the court's written decision of March 6, 1978, embodied in its order of May 25, 1978, and reduced to judgment on July 21, 1978, from which the State appeals.

The judgment granted to the executors the sum of $416,714 plus interest and costs, exclusive of additional claims asserted by them in their counterclaim for losses after February 13, 1976 and prior to the appointment of the receivers on October 20, 1976, as to which the State at that time had not yet interposed its reply. The award included allowances for rent of the facility, real estate taxes and insurance, reimbursement for money advanced to the receivership by the estate for payroll, administration, Workmen's Compensation, etc., and also reimbursement for the value of the inventory and for Medicaid and Medicare and private patient fees, together with interest thereon to July 1, 1978.

The State's principal brief on appeal addresses the merits of the trial court's determinations. In its brief in reply to defendants' brief, however, for the first time the State argues that the trial court lacked jurisdiction to entertain the claims against the State and to render judgment against the State, citing subdivision 4 of section 9 of the Court of Claims Act.

Without doubt, Supreme Court had jurdisdiction to determine the administrative issues between the Commissioner and the estate (Board of Educ. of No. Colonie Schools, Newtonville v. Levitt, 42 AD2d 372, 374; and see Matter of Fehlhaber Corp. v. O'Hara, 53 AD2d 746; Matter of Pfingst v. Levitt, 44 AD2d 157, mot lv app den, 34 NY2d 518). With respect to such items properly demanded of the Commissioner by defendants in their counterclaim, however, the latter should be deemed converted into an Article 78 proceeding, and we so treat it.

The executors' claims, however, go far beyond items properly considered in an Article 78 proceeding. The executors allege in their answer and counterclaims that in order to induce them to keep the Home in operation representatives of the State agreed to pay them a fair rental for their facility and the fair value of the inven-

tory used in connection therewith, and they seek other reimbursements and damages.

We believe that in the circumstances of this case, absent specific statutory authority (see Public Health Law, § 2810), trial term properly assumed jurisdiction to exercise its equitable powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients (see Covington Drawbridge Company v. Shepherd, 21 How [62 US] 112, 125; Davis v. City of New York, 49 AD2d 874; Toler v. Toler Convalescing Home, 236 Ark, 24, 32-33 (1963), adopting opn of the Chancellor; 13 Carmody-Wait 2d, §§ 83:2 and 83:6; Brown, An Appraisal of the Nursing Home Enforcement Process, 17 Ariz L Rev, 304, 339-341 (1975); Grad, Upgrading Health Facilities: Medical Receiverships As An Alternative To License Revocation, 42 Univ of Col L Rev, 419 (1971); cf. Public Health Law, § 2810 and Social Services Law, § 461-f). Such jurisdiction, however, did not authorize the court to determine the consequent issues as to who should bear the operating losses not governed by regulations for patient care allowances and Medicaid, Medicare and patient fee payments. The Court of Claims has exclusive juisrdiction of issues as to the State's liability for tort and contract claims, whether the claims are asserted in an original action or by way of counterclaim (People v. Dennison, et al., 84 NY 272, 280-281; Siegel, New York Practice, § 17). The State's sovereign immunity from suit has been waived only to the extent of permitting such claims to be adjudicated in the Court of Claims (Easley v. New York State Thruway Auth., 1 NY2d 374; Belscher v. New York State Teachers' Retirement System, 45 AD2d 206, 208; and see Matter of T.P.K. Constr. Corp. v. O'Shea, 69 AD2d 316; Olmstead v. Britton, 48 AD2d 536, 538). The State Department of Health is not a separate legal entity as are some State-created public corporations (see Grace & Co. v. State Univ. Constr. Fund, 44 NY2d 84; Cole v.

State of New York, 64 AD2d 1023; Story House Corp. v. State of New York Job Development Auth., 37 AD2d 345, affd 31 NY2d 942; see Public Authorities Law, § 1002), but is a branch of the State government (Public Health Law, § 200). As such, disputes with it with respect to fair compensation must be adjudicated in the Court of Claims (see Public Health Law, § 401).

In light of defendants' allegations that responsible State officials represented to them that it was in the State's interest that operation of the Home be continued and that the State would appropriately compensate the estate therefor, and that in reliance thereon the executors sought the appointment of a receiver to continue the operation until the State could make other arrangements for the patients in the Home, we conclude that defendants have bona fide issues to present to the Court of Claims.

It is unfortunate that the issue of jurisdiction herein was not raised before the case reached us on appeal. It presents the practical side issue as to whether defendants are now barred from re-litigating their claims in the Court of Claims because of their failure to file a timely notice of claim in that court. Defendants argue, with much justification, that since the State did not reply to their counterclaims for nearly two years, and did not raise the issue of jurisdiction until it served its reply brief on this appeal, it waived that issue. Why defendants did not move for judgment by default against the State on their counterclaims as to which the defendant had not replied is not revealed. Regardless of that, there is no doubt that the State has been involved in these issues from the beginning, and it has not been prejudiced in any way by the failure of the defendants to file a timely notice of claim.

Belated as is the State's argument of lack of jurisdiction, we cannot hold that it has waived the jurisdictional

question, and we conclude that the principal issues of defendants' claims must be litigated, if at all, in the Court of Claims. Nevertheless, to foreclose future legal proceedings on the question of notice of claim (Court of Claims Act, § 10, subd 4), we rule, sua sponte, that if the executors and other defendants choose to pursue such claims in the Court of Claims, they may file a notice thereof within 30 days of the entry of the order hereon, and the State will be estopped from moving to dismiss as barred by the statute of limitations (see Salesian Soc. v. Village of Ellenville, 41 NY2d 521; Bender v New York City Health & Hosps. Corp., 38 NY2d 662; Court of Claims Act, § 10, subd 6).

We find no merit in defendants' argument that the Commissioner of Health lacks standing to pursue the appeal in this action, begun by the Atttorney General. The record shows that a proper transfer was made to the Commissioner for his continuance of the action.

The judgment should, therefore, be modified to delete all of the award to defendants except item 3 thereof (patient allowances of $199) and item 7 (Medicaid, etc. payments of $29,650), totalling $29,849, plus appropriate interest, as to which the judgment should be affirmed, all without prejudice to the defendants pursuing their remaining claims in the Court of Claims as above indicated.

Dillon, P.J., Cardamone, Simons and Callahan, JJ., concur.

APPENDIX M

Present: HON. JAMES B. KANE

At a Special Term of the Supreme Court of the State of New York, held in and for the County of Buffalo at the County Court House, Buffalo, New York, on the 17th day of August 1979.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

Index No. E34616

PEOPLE OF THE STATE OF NEW YORK
Plaintiff

-v-

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

ORDER

The Plaintiff People of the State of New York and the Commissioner of Health of the State of New York by their attorney Melinda Bass, Gary Eichenbaum of Counsel, having duly moved for an order discharging any obligation that the Commissioner of Health of the State of New York as receiver of Abbott Manor Nursing Home may have for the maintence, operation and possession of the realty and contents of the premises located at 505 Abbott Road, City of Buffalo, State of New York;

AND the above-named Defendants, by their attorneys Miller, Farmelo, Cane & Greene, Norman E.S. Greene of Counsel, having duly moved in the above captioned action and the action of Robert Lounsbury, Sr., Helen Symczak, Eddie Verez, Anna M. George, and Anna Healy, Plaintiffs against Robert P. Whalen, as Commissioner of Health, and Receiver of the Abbott Manor Nursing Home, Defendants, for an order enjoining the Commissioner of Health, his agents, and his employees from taking any action to close the Abbott Manor Nursing Home, including, but not limited to tendering possession of the facility to the owner of the home, and attempting to discontinue utility service; and an order adjudicating the Commissioner of Health, and those of his agents and employees that have been acting in concert with him, to be in contempt of this Court.

NOW, upon reading Plaintiff's order to show cause granted by the Honorable James B. Kane on August 17, 1979, and the affidavit of Mary Kirwan, sworn to August 16, 1979 in support of Plaintiff's motion and the Defendants' show cause order granted August 16, 1979, by the Honorable James B. Kane and the affidavit of Norman E.S. Greene in support of Defendants' motion and upon all other papers herein, and after having heard on August 17, 1979 Gary Eichenbaum of Counsel, to Melinda A. Bass, attorney for Plaintiff State of New York and the Commissioner of Health of the State of New York in support of Plaintiff's motion and Norman E.S. Greene, of Counsel to Miller, Farmelo, Cane & Greene, attorneys for Defendants Abbott Manor Nursing Home, Saul Birnbaum, Janice Birnbaum and Miriam Wolf, in support of Defendants' motion, it is hereby,

ORDERED, that Plaintiff's motion be granted and that Defendants' motion be in all respects denied.

IT IS FURTHER ORDERED, that the Commissioner of Health and the Plaintiff State of New York be re-

lieved of any responsibility that they may have for continual possession and maintenance, including utility services, of premises known both as 505 Abbott Road, and Abbott Manor Nursing Home, Buffalo, New York. This transfer of possession is to take place at 505 Abbott Road, on noon, September 14, 1979. This order shall not affect any rights that the Commissioner's receivership may have to charge back to Defendants any costs associated with the maintenance and possession of 505 Abbott Road, Buffalo, New York, since the nursing home became vacant, nor should the other rights of Respondants be affected.

DATED: Buffalo, New York
September 12, 1979

/s/ James B. Kane
JAMES B. KANE, J.S.C.

GRANTED Sep. 13, 1979.

/s/ [Iliegible]

APPENDIX N

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in the Erie County Hall in the City of Buffalo, New York on the 25th day of May, 1978.

PRESENT: HON. THEODORE S. KASLER, J.S.C.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

Index No. E 34616

PEOPLE OF THE STATE OF NEW YORK
Plaintiff

-vs-

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

ORDER

An action having been commenced by Louis J. Lefkowitz, Attorney-General of the State of New York, *ex rel* the People of the State of New York, for a judgment enjoining and restraining the defendants Saul Birnbaum and Janice J. Birnbaum, as co-executors of the Estate of Bernard P. Birnbaum from closing a nursing home facility known as Abbott Manor Nursing Home, for which nursing home facility the late Bernard P. Birnbaum had an operating certificate,

And an order to show cause having been granted by the Hon. Norman A. Stiller, J.S.C. on September 5, 1976 which order to show cause granted a temporary restraining order, *ex parte*, restraining and enjoining the defendants from discontinuing or threatening to discontinue the operation of the Abbott Manor Nursing Home,

And on the return date of the aforesaid motion for a preliminary injunction the defendants having appeared and filed and served an Answer and having interposed as an affirmative defense a separate cause of action for the appointment of a receiver pursuant to Section 2810 of the New York Public Health Law and pursuant to the authority invested in this Court by law, and this Court having considered and granted such application for receivership effective October 20, 1976 appointing Theresa Skokowski and Margaret Galuch as co-receivers of the Abbott Manor Nursing Home, which appointment was exercised by this Court pursuant to equity power to implement Section 2810 of the New York State Public Health Law, and the Court further having decided that the provisions of such section of the New York Public Health Law are deemed to apply to this receivership, and the Court therefore having dispensed with the necessity of the receivers to file any bond,

And this Court having further ordered that upon application of the defendants Saul Birnbaum and Janice Birnbaum, that a hearing and a determination of the fair monthly rental value of the premises and facilities known as the Abbott Manor Nursing Home, which premises and facilities were determined to be assets of the Estate of Bernard P. Birnbaum, and this Court further having ordered a hearing to determine the value of the assets delivered to the co-receivers and for a full accounting thereof pursuant to such previous order, and this Court having further ordered a hearing for the purpose of determining any further issues arising out of the creation of the co-receivership in accordance with the

provisions of Section 2810 as recited aforesaid, and in accordance with such order evidentiary hearings having been held before this Court on December 15, 1976 and on February 28, 1977, during which hearings full participation was permitted by this Court of all counsel, including representatives of the plaintiff State of New York, Office of the Attorney-General, counsel for the receivership, Gary S. Bittner, Esq. and counsel and successor counsel for the defendants herein, Moot, Sprague, Marcy, Landy, Fernbach and Smyth, John J. Phelan, and successor counsel thereto Miller, Farmelo, Cane & Greene, Norman E. S. Greene, of counsel,

And this Court thereafter having required the submission of all appropriate proposed Finding of Fact and Memordanda of Law as proposed by the parties, and the Court having heard all argument from counsel representing all parties herein,

And the Court having further considered and reconsidered issues relative to fair market rental value, inventory and value of other assets transferred to the co-receivers and any other additional consideration due the Estate of Bernard P. Birnbaum by the State of New York, and upon all other prior proceedings, pleadings, hearing and other orders and argument had herein,

And after hearing Miller, Farmelo, Cane & Greene, Norman E. S. Greene, of counsel for the defendants herein in support of a motion made to establish fair market rental value, inventory valuation, valuation of other assets transferred to the receivership and other additional compensation due the Estate by the State of New York, and Gary S. Bittner, attorney for the receivers previously appointed by this Court having appeared herein, and the plaintiff People of the State of New York, by Bruce R. Schmidt, having appeared in opposition thereto, and due deliberation having been had,

NOW, on motion of Norman E. S. Greene, attorney for the defendants herein, it is

ORDERED, that the Memorandum Decision of this Court dated March 6, 1978 determining various sums, funds or amounts of money due to the Estate of Bernard P. Birnbaum from the State of New York be determined herein and reduced to judgment as follows:

1. This Court determines that the fair market rental value of Abbott Manor Nursing Home is $90,400.00 per year for building and appurtenances and $16,000.00 for operating equipment, or a total of $106,400.00 per year.

2. This Court further determines that consideration of that yearly rental figure is based on the concept of a net-net lease, the plaintiff State of New York is therefore also responsible for all other expenses incurred in connection with the property such as real estate taxes, insurance, maintenance expenses and other incidental expenses.

3. The Estate is entitled to reimbursement from the State of New York for all monies advanced by the Estate to the receivership, including amounts advanced for payroll taxes, patient allowances, administrative course fees and bookkeeping services paid for by the Estate until such time as the receivers were able to secure their own services.

4. The Estate is entitled to reimbursement for all inventory items on the premises of Abbott Manor as of the date of the receivership, October 20, 1976 and, in accordance with the stipulation received by this Court and all parties having agreed thereto, the value thereof is determined to be $48,094.91.

5. The Estate is entitled to nineteen thirty-firsts of the Medicaid—Medicare and private pay monies received and receivable for the month of October, 1976 and to that portion of the disability, liability boiler and workman's compensation insurance premiums paid by the Estate but allocable to periods after October 20, 1976.

6. The Estate is entitled to reimbursement for the interest expense incurred on loans procured by the Estate on or after October 20, 1976 and used to advance monies to the receivers; and it is further

ORDERED, that all such additional amounts of compensation due the Estate be determined and reduced to a dollar valuation for the purpose of entry of judgment in accordance with the provisions of Section 2222 of the Civil Practice Law; and it is further

ORDERED that the plaintiff State of New York is and they forthwith are directed to pay over to the defendants herein all such sums of money as are included within this Order coincident with the filing of such order.

Dated: Buffalo, New York
May 25, 1978

/s/ Theodore S. Kasler
THEODORE S. KASLER, J.S.C.

Granted May 25, 1978

Spec. Dep Clerk /s/ Mary Galley

APPENDIX O

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff

-vs-

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, (BRUCE R. SCHMIDT, Assistant Attorney General, of counsel) for New York State; New York State Department of Health and New York State Department of Social Services

NORMAN E. GREENE for Estate of Bernard P. Birnbaum, Dec'd. and Saul Birnbaum, Janice Birnbaum and Miriam Wolff, Defendants

FRED D. BUSCAGLIA for Erie County Department of Social Services

VINCENT J. MUFFOLETTO for Erie County Department of Finance

GARY S. BITTNER for Co-receivers of the ABBOTT MANOR NURSING HOME.

ORDER

KASLER, J.

Pursuant to § 2810(e)(i) of the Public Health Law the receivership created by this Court pursuant to § 2810

(2) of the Public Health Law on October 20, 1976 is hereby ordered terminated and co-receivers Margaret D. Galluch and Theresa M. Skokowski are relieved of all duties relating thereto. The co-receivers are ordered to render a full and complete accounting to the Court and shall, along with the attorney for the co-receivers, submit verified claims for their reasonable fees which are to be paid to them by the State of New York.

In addition, it is ordered that Robert P. Whalen as Commissioner of the New York State Department of Health be, and hereby is, appointed receiver of the Abbott Manor Nursing Home and shall take full responsibility for the operation and maintenance of said facility and shall take full responsibility for all operating and maintenance expenses during the period of his appointment which appointment shall last until such order of this Court directs otherwise. In addition, the commissioner shall take full responsibility for all expenses incurred by the receivership just terminated including but limited to: (1) the fair monthly rental value of Abbott Manor as determined by this Court on March 6, 1978; (2) all monies advanced to the receivership by the Estate of Bernard P. Birnbaum; (3) $48,094.91 representing the value of all inventory items on the premises of Abbott Manor on October 20, 1976; (4) 19 31sts of the Medicaid, Medicare and private pay monies received and receivable for the month of October 1976, and to that proportion of the disability, liability, boiler and workmen's compensation insurance premiums paid by the Estate of Bernard Birnbaum but allocable to periods after October 20, 1976; (5) the interest expense incurred for loans procured by the Estate of Bernard P. Birnbaum on or after October 20, 1976 and used to advance monies to the receivership; (6) all other operating and maintenance expenses incurred by the receivership but which have not been paid due to circumstances beyond the control of the co-receivers.

The Commissioner of Health is ordered to take charge of the operation of Abbott Manor Nursing Home; to collect all income generated by the providing of facilities and the rendering of services at Abbott Manor Nursing Home; to pay all expenses arising with respect to the providing of facilities and rendering of services at Abbott Manor Nursing Home; and to perform all other duties and functions specified by § 2810 of the Public Health Law including, if he deems it necessary, to provide for the orderly transfer of all patients in Abbott Manor Nursing Home to other facilities or to make other provisions for their continued safety and health care.

DATED: Buffalo, New York
May 8, 1978

/s/ Theodore S. Kasler
THEODORE S. KASLER
Justice of Supreme Court

APPENDIX P

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

THE PEOPLE OF THE STATE OF NEW YORK,
Plaintiff

-vs-

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

LOUIS J. LEFKOWITZ, Attorney General, State of New York, (MICHAEL G. WOLFGANG, Assistant Attorney General of counsel) for the People

MILLER, FARMELO, CANE & GREENE, (NORMAN E. S. GREENE of counsel) for Defendants

GARY S. BITTNER for Co-Receivers

MEMORANDUM

KASLER, J.

This matter is before the Court for the valuation of fair market rental, inventory and other additional compensation due the Estate of Bernard P. Birnbaum by the State of New York.

On October 20, 1976 this Court appointed Theresa Skokowski and Margaret Galluch as co-receivers to assume control of the operation of Abbott Manor Nursing Home. A brief recitation of the factual setting will demonstrate why that appointment was necessary. Bernard

P. Birnbaum, the sole owner and licensed operator of Abbott Manor died in February, 1976. Thereafter, the co-executors of his estate notified the Department of Health that they did not intend to continue the operation of the home. State officials were made aware of the co-executors' concern about continuing a protracted loss operation which was resulting in the wasting of estate assets for which they, as fiduciaries, were responsible.

When the State failed to act, the estate informed relatives of the Home's residents to transfer the residents to other suitable facilities by September 7, 1976. At this point, the State's attorney secured a temporary restraining order enjoining the estate from discontinuing the operation of the Abbott Manor Nursing Home or reducing the level of patient care at the facility. It was at this juncture that the Court acted pursuant to the provisions of the New York State Public Health Law, Section 2810 and ordered the receivers appointed.

Inherent in that order was the proposition that the State must bear the full legal and financial responsibility for the receivers. In fact by the order of this Court of December 29, 1976, the State was mandated to direct reimbursement by the Department of Health to the receivers of actual expenses of operation sustained by the receivers.

The decision of the Court today delineates just what some of those responsibilities are. In doing so the Court is painfully aware of the statutory deficiences which the decision seems to ignore. However, this Court is not limited to statutory authority when in its sound discretion the Court determines that a unique situation requires the exercise of the broad powers vested in it by the law of equity.

The safety and welfare of the residents of Abbott Manor are the Court's first concern and therefore Abbott Manor must remain open. But, it would be unconscion-

able that this should have to be accomplished as the result of a virtual confiscation of private property. It is in this light that the following decision is rendered and this Court's memorandum decision of June 30, 1977 is in all respects rescinded.

FAIR RENTAL VALUE

The Court determines the fair market rental value of Abbott Manor to be in accordance with the opinion of the State's expert witness Malcolm VanDyke, whose qualifications were conceded to by the defendants. The Court finds that the fair market annual rental value for Abbott Manor to be $90,400 for building and appurtenances and $16,000 for operating equipment. These figures are based on a net net lease and the State is therefore also responsible for all other expenses incurred in connection with the property such as real estate taxes, insurance, maintenance expenses and other incidental expenses.

ADVANCED MONIES AND OTHER ITEMS

The estate is entitled to reimbursement from the State for monies advanced by them to the receivership. These include amounts of $5,545.51 for the payroll of the week ending October 23, 1976; $8,332.91 for the payroll for the week ending October 29, 1976; $1,529.85, the pro rata amount of payroll taxes for the week ending October 23, 1976; $198.60, the pro rata amount of patient allowances for the twelve days of October; $100 for the administrative course taken by receiver—Skaktowski $1,189.70 for bookkeeping services which were paid for by the estate until the receivers were able to secure their own services.

The state is entitled to reimbursement for all inventory items on the premises of Abbott Manor on October 20, 1976 and the value thereof is determined to be $48,094.91.

The estate is entitled to 19/31sts of the Medicaid, Medicare and private pay monies received and receivable for the month of October 1976, and to that proportion of the disability, liability, boiler and workmen's compensation insurance premiums paid by the estate but allocable to periods after October 20, 1976.

The estate is entitled to reimbursement for the interest expense incurred for loans procured by the estate on or after October 20, 1976 and used to advance monies to receivers.

All other items sought as alleged to be due and owing the estate are denied.

Submit order.

DATED: Buffalo, New York
March 6, 1978

/s/ Theodore S. Kasler
THEODORE S. KASLER
Justice of Supreme Court

APPENDIX Q

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in the Erie County Hall in the City of Buffalo, New York on the 28th day of December, 1976.

Present: HON. THEODORE S. KASLER, J.S.C.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

Index No. E 34616

PEOPLE OF THE STATE OF NEW YORK
Plaintiff

-vs-

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

ORDER

A receivership of the operation of the Abbott Manor Nursing Home, 505 Abbott Road, Buffalo, New York, a residential health care facility, having been created by this Court on October 20, 1976 for the purpose of insuring the care and treatment of the residents thereof upon the application of the defendants Saul Birnbaum and Janice Birnbaum, the co-executors of the Estate of Bernard P. Birnbaum and orders having been granted by this Court on November 4, 1976 and on November 23,

1976 in the furtherance thereof, which receivership was created pursuant to the provisions of Section 2810 of the New York Public Health Law and in the exercise of the equitable power of this Court to protect the health and safety of the residents of said residential health care facility,

AND Theresa Skokowski and Margaret Galluch, the co-receivers appointed by this Court having moved this Court for an order directing Robert P. Whalen M.D., the New York State Commissioner of Health, to reimburse them for the actual costs of the care and treatment of the residents of such facility and it appearing to the satisfaction of this Court that the payment of the actual costs of the operation of such facility for patient care and treatment, excluding real property reimbursement and costs of the receivership, on a current basis, is necessary for the protection of the health, safety and welfare of the residents of such facility,

AND on the 28th day of December, 1976, the respective parties to this action having appeared before this Court pursuant to this Court's direction; the plaintiff State of New York *ex rel* Robert P. Whalen M.D., the New York State Commissioner of Health, by the Attorney General of the State of New York, Bruce R. Schmidt, Assistant Attorney General, of counsel, in opposition to the motion; the defendants, Saul Birnbaum and Janice Birnbaum, the co-executors of the Estate of Bernard P. Birnbaum, by their attorneys, Moot, Sprague, Marcy, Landy, Fernbach and Smyth, John J. Phelan, of counsel, in support of the motion; and the co-receivers of the Abbott Manor Nursing Home, Theresa Skokowski and Margaret Galluch by their attorney Gary S. Bittner in support of the motion and this Court having heard oral argument of counsel and due deliberation having been had,

NOW THEREFOR this Court having determined that it is an administrative function of Robert P. Whalen M.D., the New York State Commissioner of Health pur-

suant to Article 28 of the New York Public Health Law to pay the actual costs of the care and treatment of the residents of such residential health care facility during the period of a receivership created pursuant to Section 2810 of the New York Public Health Law and that said administrative function of Robert P. Whelan M.D., the New York State Commissioner of Health, is ministerial in nature,

AND this Court having further determined that Section 2810 of the New York Public Health Law requires and authorizes the New York State Commissioner of Health to protect the health, safety, and welfare of the patients in a residential health care facility during the period of a receivership and authorizes him to take charge of such facility to protect the health, safety and welfare of the patients in a residential health care facility and that the health, safety and welfare of the patients in said facility requires that the co-receivers are provided with funds to pay the actual costs for the care and treatment of the patients in said facility at the time the costs are incurred, and this Court having further determined that Robert P. Whelan M.D., the New York State Commissioner of Health has failed and neglected to perform the administrative function imposed upon him by Section 2810 of the New York Public Health Law and that a public health emergency exists which requires specific action for the purpose of protecting the health, safety, and welfare of the patients in the facility, which action and direction of this Court is specifically limited until a final judicial determination of all issues in the action new before this Court,

AND this Court having further determined that, for all the aforesaid reasons, a peremptory writ of mandamus should issue from this Court,

NOW upon the motion of the co-receivers, Theresa Skokowski and Margaret Galluch and upon the motion of the defendants, it is therefore

ORDERED that Robert P. Whelan M.D., the New York State Commissioner of Health, shall pay to the co-receivers each week a sum of money sufficient to pay the actual costs of the co-receivers for the care and treatment of the patients residing in the Abbott Manor Nursing Home, excluding real property costs and the costs of the receivership, as hereinafter provided and that for the purpose of obtaining the payment thereof, the co-receivers shall, on Monday of each week, commencing with the first Monday after the date of the granting of the within order, deliver to Dr. LaVerne Campbell, the Regional Director of the New York State Department of Health, a completed voucher upon the standard state of New York form containing an itemized statement of the costs of the care and treatment of such patients residing in the facility the previous week and funds sufficient to pay such expenses, as provided for in such voucher, shall be delivered to the co-receivers by Robert P. Whalen M.D., the New York State Commissioner of Health, on or before Thursday of the same week and in the event that there is any dispute between the co-receivers appointed by this Court and Robert P. Whalen M.D., the New York State Commissioner of Health, regarding the reasonableness or necessity of the voucher submitted by the co-receivers or in the event that Robert P. Whalen M.D., the New York State Commissioner of Health, fails to deliver the funds necessary to provide for the care and treatment of the residents of the Abbott Manor Nursing Home, as provided for in said voucher, the co-receivers or Robert P. Whalen M.D., the New York State Commissioner of Health, his designee or agent, or any of the parties to this action may return to this Court upon four days' written notice to all the other parties herein, with satisfactory proof thereof, for such a further order by this Court as is necessary to protect the health and safety of the patients residing at the Abbott Manor Nursing Home and it is further

ORDERED that during the period within which Robert P. Whalen M.D., the New York State Commissioner of Health, is paying the current expenses for the care and treatment of the patients of the Abbott Manor Nursing Home, the co-receivers shall create a separate bank account and shall deposit therein all revenues which they receive for the care and treatment of the patients during said period and they shall retain said revenues pending the further order of this Court, and it is further

ORDERED that Robert P. Whalen M.D., the New York State Commissioner of Health create or approve the necessary vouchers forthwith to bring about the payments to the co-receivers of the Abbott Manor Nursing Home as provided herein.

DATED: Buffalo, New York
December 29, 1976

/s/ Theodore S. Kasler
THEODORE S. KASLER, J.S.C.

Granted A. Devine
Spec. Dep. Clk.
Dec. 29, 1976

APPENDIX R

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in the Erie County Hall in the City of Buffalo, New York on the 15th day of September, 1976

Present: HON. THEODORE S. KASLER, J.S.C.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

Index No. E 34616

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff

vs.

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

ORDER

An action having been commenced by Louis J. Lefkowitz, Attorney-General of the State of New York, *ex rel* the People of the State of New York, for a judgment enjoining and restraining the defendants Saul Birnbaum and Janice J. Birnbaum, as co-executors of the Estate of Bernard P. Birnbaum from closing a nursing home facility known as the Abbott Manor Nursing Home, for which nursing home facility the late Bernard P. Birnbaum held an operating certificate,

AND an order to show cause having been granted by the Hon. Norman A. Stiller J. S. C. on September 5, 1976 which order to show cause granted a temporary restraining order, *ex parte*, restraining and enjoining the defendants from discontinuing or threatening to discontinue the operation of the Abbott Manor Nursing Home and further from discontinuing, reducing or threatening to discontinue or reduce the level of care and treatment provided for the patients then residing at said nursing home facility and further ordered the defendants to show cause at a Special Term of this Court on September 10, 1976 why a preliminary injunction should not be granted pursuant to § 2801-c *Injunctions* of the Public Health Law of the State of New York and said motion for a preliminary injunction was thereafter adjourned to September 15, 1976,

AND on the return date of the aforesaid motion for a preliminary injunction the defendants having appeared by Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys-at-law, and having filed and served an answer and having interposed as an affirmative defense a separate cause of action for the appointment of a receiver pursuant to § 2810 of the New York Public Health Law and pursuant to the authority invested in this Court by law; and the defendants Saul Birnbaum and Janice Birnbaum as executors of the estate of Bernard P. Birnbaum having set forth a counterclaim for a declaratory judgment and the aforesaid applications for relief having come on duly to be heard,

NOW upon reading and filing the pleadings in the action and upon the order to show cause granted by the Hon. Norman A. Stiller J.S.C. on September 5, 1976, and upon the affidavit of Michael G. Wolfgang, Assistant Attorney-General sworn to September 5, 1976, and upon the affidavit of LaVerne E. Campbell M.D. sworn to September 5, 1976, and upon the affidavit of Leona C. Zdrozewska sworn to September 5, 1976, all

of which affidavits were submitted in support of the motion for a preliminary injunction.

AND in opposition thereto, and in support of the application for appointment of a receiver, affidavits having been submitted of John J. Phelan, attorney-at-law sworn to September 15, 1976, of George J. Soloman, attorney-at-law, sworn to September 13, 1976, of Sidney Finger C.P.A. sworn to September 13, 1976 and an affirmation of Sidney A. Florea, attorney-at-law, dated September 13, 1976 having been submitted and Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys for the defendants having filed a memorandum of law,

AND after hearing Michael G. Wolfgang, Assistant Atorney-General of the State of New York on behalf of the plaintiff and after hearing John J. Phelan, of counsel for Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys for the defendants and attorney Sidney A. Florea, attorney for the Estate of Bernard P. Birnbaum having appeared and the Court having given due deliberation to the applications of the parties for relief,

AND an order having been granted by this Court on November 4, 1976 appointing Theresa Skokowski and Margaret Galluch co-receivers of the Abbott Manor Nursing Home, it is further

ORDERED, in order to define and implement the powers and responsibilities of Theresa Skokowski and Margaret Galluch co-receivers of the Abbott Manor Nursing Home, appointed by this Court on November 4, 1976; that the co-receivers of the Abbott Manor Nursing Home are authorized to perform all acts in the operation of the Abbott Manor Nursing Home during the period of the receivership in accordance with the powers of a receiver contained in § 2810 of the New York Public Health Law; that however the co-receivers have no authority in any manner to encumber the premises upon which the

Abbott Manor Nursing Home is located or to borrow at the risk of the Estate of Bernard P. Birnbaum or to pledge as collateral any of the assets or property, real or personal, of the said Estate or to pledge the credit of the said Estate or its fiduciaries and it is further

ORDERED that the co-receivers appointed by this Court in regard to the Abbott Manor Nursing Home are appointed pursuant to the equity power of this Court to implement § 2810 of the New York Public Health Law and the provisions of such section of the New York Public Health Law are deemed to apply to this receivership and by reason thereof the co-receivers shall not be required to file any bond and the application of the defendants Saul Birnbaum and Janice Birnbaum as executors of the Estate of Bernard P. Birnbaum, that the co-receivers shall be required to post a surety bond to guarantee the faithful performance of their duties and responsibilities, the posting of which has been opposed by the plaintiff herein, is denied and it is further

ORDERED that the application of the defendants, Saul Birnbaum and Janice Birnbaum, for a hearing and determination of the fair monthly rental of the premises and facilities known as the Abbott Manor Nursing Home, which premises and facilities are assets of the Estate of Bernard P. Birnbaum and for the determination of the value of the assets delivered to the co-receivers and the accounting thereof, pursuant to the order of this Court and for the determination of any further issues arising out of the creation of the co-receivership all in accordance with § 2810 of the New York Public Health Law and the equitable jurisdiction of this Court be and it hereby is denied for a period of ninety days from the date of this order with the proviso that upon a determination being made by the Commissioner of Health of the State of New York, his designee or agent, including the appropriate disbursing agency of the government of the State of New York, adverse to the payment of the

actual costs of the co-receivers for the care and treatment of the patients residing in the Abbott Manor Nursing Home who are qualified for Medicaid reimbursement *nunc pro tunc* from October 20, 1976 and the payment of the fair monthly rental of the premises and facilities known as the Abbott Manor Nursing Home and the payment for the value of any assets, including inventory, delivered to the co-receivers pursuant to the order of this Court for the operation of the Abbott Manor Nursing Home, all of which determinations shall be made *nunc pro tunc* from October 20, 1976, in such event the defendants herein shall be entitled to an immediate hearing upon all of the aforesaid issues and for the prompt determination thereof and it is further

ORDERED that the temporary restraining order granted by the Hon. Norman A. Stiller J.S.C. on September 5, 1976 be and it hereby is vacated and it is further

ORDERED that the motion of the plaintiff for a preliminary injunction pursuant to § 2801-c *Injunctions* of the New York Public Health Law be and it hereby is denied and it is further

ORDERED that the application of the defendants for a preference for the trial of the counterclaim for a declaratory judgment is denied without prejudice to the making of a further application sixty days from the date of this order and it is further

ORDERED that the application of the defendants Saul Birnbaum and Janice Birnbaum as executors of the Estate of Bernard P. Birnbaum, that the co-receivers shall pay over to the Estate of Bernard P. Birnbaum that portion of the Medicaid reimbursement funds for the month of October, 1976, which constitutes reimbursement for the care and treatment rendered to the patients residing at the Abbott Manor Nursing Home up to and including October 20, 1976, is denied without

prejudice to the making of a further application by the defendant executors in the event of a necessity for a hearing as hereinbefore conditionally provided and the co-receivers are authorized to retain such Medicaid reimbursement funds for the month of October, 1976 with the understanding that it is determined by this Court that the Medicaid reimbursement funds for the care and treatment of the aforesaid patients for the period from October 1, 1976 to October 20, 1976 are determined to be a receivable owed by the co-receivers to the Estate of Bernard P. Birnbaum.

DATED: Buffalo, New York
November 22 1976

/s/ Theodore S. Kasler
J.S.C.

Granted

/s/ L.S. Chrosniak
Spec. Dep. Clerk

Nov. 23, 1976

APPENDIX S

At a Special Term of the Supreme Court of the State of New York held in and for the County of Erie in the Erie County Hall, in the City of Buffalo, New York on the 15th day of September, 1976.

PRESENT: HON. THEODORE S. KASLER J.S.C.

STATE OF NEW YORK SUPREME COURT
COUNTY OF ERIE

PEOPLE OF THE STATE OF NEW YORK,
Plaintiff

vs.

ABBOTT MANOR NURSING HOME, SAUL BIRNBAUM, JANICE BIRNBAUM, MIRIAM WOLFE,
Defendants

An action having been commenced by Louis J. Lefkowitz Attorney-General of the State of New York, *ex rel* the People of the State of New York, for a judgment enjoining and restraining the defendants Saul Birnbaum and Janice J. Birnbaum, as co-executors of the estate of Bernard P. Birnbaum from closing a nursing home facility known as the Abbott Manor Nursing Home, for which nursing home facility the late Bernard P. Birnbaum held an operating certificate,

AND an order to show cause having been granted by the Hon. Norman A. Stiller J.S.C. on September 5, 1976 which order to show cause granted a temporary restraining order, *ex parte*, restraining and enjoining the defend-

ants from discontinuing or threatening to discontinue the operation of the Abbott Manor Nursing Home and further from discontinuing, reducing or threatening to discontinue or reduce the level of care and treatment provided for the patients then residing at said nursing home facility and further ordered the defendants to show cause at a Special Term of this Court on September 10, 1976 why a preliminary injunction should not be granted pursuant to § 2801-c Injunctions of the Public Health Law of the State of New York and said motion for a preliminary injunction was thereafter adjourned to September 15, 1976,

AND on the return date of the aforesaid motion for a preliminary injunction the defendants having appeared by Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys-at-law, and having filed and served an answer and having interposed as an affirmative defense a separate cause of action for the appointment of a receiver pursuant to § 2810 of the New York Public Health Law and pursuant to the authority invested in this Court by law, and the defendants Saul Birnbaum and Janice Birnbaum as executors of the estate of Bernard P. Birnbaum having set forth a counterclaim for a declaratory judgment and the aforesaid application for relief having come on duly to be heard,

NOW upon reading and filing the pleadings in the action and upon the order to show cause granted by the Hon. Norman A. Stiller J.S.C. on September 5, 1976, and upon the affidavit of Michael G. Wolfgang, Assistant Attorney-General sworn to September 5, 1976, and upon the affidavit of LaVerne E. Campbell M.D. sworn to September 5, 1976, and upon the affidavit of Leona C. Zdrozowska sworn to September 5, 1976, all of which affidavits were submitted in support of the motion for a preliminary injunction,

AND in opposition thereto, and in support of the application for appointment of a receiver, affidavits having

been submitted of John J. Phelan, attorney-at-law, sworn to September 15, 1976, of George J. Solomon, attorney-at-law, sworn to September 13, 1976, of Sidney Finger C.P.A. sworn to September 13, 1976 and an affirmation of Sidney A. Florea, attorney-at-law, dated September 13, 1976 having been submitted and Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys for the defendants having filed a memorandum of law,

AND after hearing Michael G. Wolfgang, Assistant Attorney-General of the State of New York on behalf of the plaintiff and after hearing John J. Phelan, of counsel for Moot, Sprague, Marcy, Landy, Fernbach and Symthe, attorneys for the defendants and attorney Sidney A. Florea, attorney for the Estate of Bernard P. Birnbaum having appeared and the Court having given due deliberation to the applications of the parties for relief, it is hereby

ORDERED that the application of the defendants for the appointment of a receiver for the Abbott Manor Nursing Home be and it hereby is granted and it is further

ORDERED that Theresa Skokowski, 365 Shanley Street, Cheektowaga, New York, a nursing home administrator duly licensed by the State of New York and Margaret Galluch, 47 Dalen Drive Lackawanna, New York, a registered nurse are hereby appointed co-receivers of the Abbott Manor Nursing Home as of October 20, 1976 and the within order of this Court granting such co-receivership shall be effective *nunc pro tunc* from such date and it is further

ORDERED that said co-receivers are authorized to contract for such legal services and accounting services as may be reasonably required to carry out their duties as co-receivers of the Abbott Manor Nursing Home.

DATED: Buffalo, New York
November 4, 1976

/s/ Theodore S. Kasler
J.S.C.

/s/ Michael Wolfgang
Asst. Atty. Gen.

Granted: November 4, 1976
[Illegible]
Spe. Dep. Clk.

No. 89-1108 (2)

Supreme Court, U.S.
FILED
MAR 14 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1989

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY, as Temporary Co-Administrators c.t.a. of the Estate of Bernard P. Birnbaum, Deceased,

Petitioners,

against

THE STATE OF NEW YORK,

Respondent.

DOL No. 82002380

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

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Dated: March 7, 1990

THE REPORTER COMPANY, INC., Walton, NY 13856—800 252-7181—1990
(3847)

Counter Statement of Question Presented

Whether a taking of property occurs when the State, pursuant to an applicable regulation, requires a nursing home that seeks to close to remain open for a reasonable time to permit alternative arrangements to be made for the continued care of its patients.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989.

JANICE BIRNBAUM and SAUL BIRNBAUM, as Executors, and ILENE L. FLAUM and CENTRAL TRUST COMPANY as Temporary Co-Administrators c.t.a. of the Estate of Bernard P. Birnbaum, Deceased,

Petitioners,

against

THE STATE OF NEW YORK,

Respondent.

DOL No. 82002380

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Brief in Opposition to Petition for Writ of Certiorari

Counterstatement of the Case

Bernard P. Birnbaum died on February 13, 1976. He had been the licensed operator of the Abbott Manor Nursing Home, an 84 bed, skilled nursing facility, located in Buf-

falo, New York (App 53a, 55a).[1] The State Department of Health ("Department") was notified of Mr. Birnbaum's death by a co-executor of the Estate on or about February 14, 1976. By letter dated February 27, 1976, the Department notified the co-executor that (App 54a):

> "Due to the recent death of your brother who was the sole proprietor of the Abbott Manor Nursing Home, the facility no longer has a legally established operator. By means of this letter, you, as the Executor of the Estate of Bernard P. Birnbaum, are being put on notice that any change or transfer of ownership must first be approved by the State Public Health Council.
>
> * * *
>
> "If termination of the operation of the facility as a health facility—i.e., as a nursing home or health related facility—is being considered, I need to be notified as soon as possible and procedures for closing the nursing home will be sent to you."

The nursing home's operating certificate was continued in effect by the Department to allow the Estate to operate the nursing home during an interim period under authority of Department regulation 10 NYCRR 401.1(c), which provides (App 56a-57a):

> "Upon the death of any person, party or member of a partnership to whom an operating certificate has been issued, the commissioner may extend the expiration date of such certificate for such time as in his discretion shall be required for the transfer of such decedent's interest in the facility, for the processing

[1] Refers to the appendix attached to the petition.

> of an application to the State Public Health Council for approval of establishment of a transferee of such decedent's interest and for the processing of an application for an operating certificate on behalf of such transferee."

During the Spring and summer of 1976, the co-executors continued to operate the nursing home. During this period a series of meetings, telephone conversations and exchanges of correspondence took place between the representatives of the Estate and the Department which, based upon the differing allegations of the parties, are described in detail in the New York State Court of Claims memorandum decision (App 58a-70a). Suffice it to say that the parties at that time explored the possibility of a counsensual receivership, transfer of the nursing home to a new operator, and an increase in the Medicaid reimbursement rate for the facility (App 57a-60a). The representatives of the Estate and the Department could not agree on the terms of a receivership and a party could not be located who was willing to acquire or take over the operation of the facility (App 58a-70a).

At that time, approximately 70% of the nursing home's patients received benefits under the Medicaid program and the remainder either paid for their own care or received benefits under the Medicare program (App 55a). The nursing home's prospective Medicaid reimbursement rate was established yearly by the State Commissioner of Health ("Commissioner") pursuant to New York State Public Health Law §§ 2807 and 2808. The rate at that time was limited by law to those costs reasonably related to the efficient production of services at the nursing home and was established in accordance with the methodology set forth in the regulations of the Department (10 NYCRR Part 86-2). Nursing homes that were dissatisfied with the rate were entitled to administrative review (10 NYCRR Part 86-2) and further judicial review pursuant to the New York

State Civil Practice Law and Rules, Article 78. The Department had nothing to do with establishing the nursing home's Medicare care rate, which was done by the appropriate federal agency, nor with the private patient rate, which was established by the nursing home.

During the negotiations with the Department in the spring and summer of 1976, the co-executors claimed that the nursing home was losing $20,000 to $30,000 a month and that they were seeking full reimbursement from the Department for its operating costs (App 55a). The Department informed the Estate that it could do nothing beyond the legally authorized limits of the Medicaid reimbursement system (App 66a).

On September 3, 1976, the Estate had employees of the nursing home send telegrams to the next of kin of patients advising them that because the Department of Health refuses to pay medicine and medical care "* * * we are unable to continue [patient's] care" and "[a]ccordingly, you are advised to make the necessary arrangements to have your relative removed no later than September 7, 1976 at 7:00 p.m.". A somewhat fuller explanation was given in the case of non-Medicaid patients (App 70a).

Faced with a precipitous closure of the nursing home, the State, by order to show cause, containing a temporary restraining order, sought in the New York State Supreme Court, Erie County, to enjoin closure of the nursing home until it complied with the applicable provisions of the State Hospital Code (10 NYCRR Part 700) (App 70a-71a). At the time relevant to this proceeding, regulations 10 NYCRR 701.3(f) and 401.3(f)[2] provided that:

---

[2]These requirements are now found in 10 NYCRR 401.3(g). Since the Court of Appeals refers to the latter provision in its decision (App 2a), references hereafter will be to 401.3(g).

> "No medical facility shall discontinue operation or surrender its operating certificate unless 90 days notice of its intention to do so is given to the commissioner and his written approval obtained."

The Department of Health interpreted this regulation to mean that a notice of intent to close, coupled with an acceptable orderly plan of closure, renders the Department powerless to prevent a closure.

The Estate, in its answer, opposed the granting of the injunction and counterclaimed for (1) the appointment of a receiver and (2) full compensation for the actual cost and value of the care and maintenance provided to patients (App 71a-72a).

By orders dated November 4, 1976 and November 26, 1976, the State Supreme Court (Kasler, J.) denied the State's application for an injunction, but directed the appointment of two long-term employees of the nursing home as co-receivers of Abbott Manor Nursing Home, *nunc pro tunc* as of October 20, 1976 (App 73a). The order of November 26, 1976, provided, *inter alia*, that the co-receivers were appointed pursuant to the equity power of the court to implement section 2810 of the New York State Public Health Law (App 74a).

By further order dated December 29, 1976, the State Supreme Court (Kasler, J.) determined that it was an administrative function of the Commissioner pursuant to Article 28 of the Public Health Law to pay the actual cost of care and treatment during the period of the receivership, and the Commissioner was ordered to pay to the co-receivers the actual cost of care under a voucher system devised by the court (App 79a). The State appealed that

order to the Appellate Division of the State Supreme Court (App 79a).

Thereafter followed a series of disputes, motions and hearings involving the co-receivers, the Estate and the State, over the amount of the Medicaid reimbursement rate of the nursing home, the fair rental to be paid to the Estate, and the Estate's claims (App 77a-87a). On January 10, 1978, the receivers, at the direction of the State Supreme Court (Kasler, J.), issued a 90-day notice of closure because of the continuing financial difficulties of the nursing home (App 80a). The State did not object and, in fact, opposed a motion to extend the receivership made by the co-receivers (App 86a-87a). Notably, the Estate did not object to the continuation of the receivership. Subsequently, the State Supreme Court (Kasler, J.) issued an order, dated May 8, 1978, which relieved the co-receivers of all duties and appointed the State Commissioner of Health as receiver of the Abbott Manor Nursing Home (App 87a). It directed that he (App 88a):

> "shall take full responsibility for all operating and maintenance expenses during the period of his appointment which appointment shall last until such order of this Court directs otherwise."

In addition, the Commissioner was directed to take responsibility for expenses of the terminated receivership. The State appealed this order by notice of appeal dated June 2, 1978 (App 88a).

Thereafter, the Supreme Court (Kasler, J.), by order dated May 25, 1978 and judgment dated July 21, 1978, reduced to judgment the amounts found due and owing to the Estate by the State, with respect to fair rental value, real estate taxes, moneys advanced to the receivership, reimbursement for all inventory and the proportionate alloca-

tion of Medicaid payments for October 1976. The State also appealed from that order and judgment (App 89a).

On November 2, 1979, the Appellate Division, Fourth Department, in a single opinion (App 122a-129a; 70 AD2d 434), decided the State's appeals, holding that the State Supreme Court had properly exercised "* * * its powers to appoint a receiver and direct that the operation of the Home be continued thereunder for the protection of the patients" (App 127a). However, it held that the State Supreme Court did not have jurisdiction to determine the consequent issues as to who should bear the operating losses not governed by regulations for patient care allowances and Medicaid, Medicare and patient fee payments, since the "Court of Claims has exclusive jurisdiction of issues as to the State's liability for tort and contract claims" (App 127a). The Appellate Division gave the Estate thirty days to file a notice of claim in the New York State Court of Claims. On December 18, 1980, the New York State Court of Appeals affirmed the Appellate Division for the reasons stated by that court (App 92a; 52 NY2d 766).

On December 20, 1978, the Estate sought and obtained a temporary restraining order which, *inter alia,* enjoined the transfer of the remaining patients from Abbott Manor, except by voluntary means. All patients were discharged from Abbott Manor prior to August 16, 1979. On September 13, 1979, the State Supreme Court (Kane, J.), over the objection of the Estate, ordered that "* * * the Plaintiff State of New York be relieved of any responsibility they [*sic*] may have for continued possession and maintenance, etc." of the nursing home (App 92a).

On November 30, 1979, the claimants filed their claim (No. 63695) in the New York State Court of Claims (App 41a). They claimed damages for the period from October

20, 1976 through November 30, 1979, on the grounds of an alleged *de facto* appropriation of the nursing home by the State's action in preventing closure of the nursing home and continuation of a losing business through the court-appointed receivership[3] (App 19a, 53a).

In April 1981, claimants moved for partial summary judgment with respect to Claim No. 63695 (App 53a).[4] They sought and were granted an award of damages for the period of October 20, 1976 to September 14, 1979 (App 51a).

The State, in opposing the motion, contended that in the midst of continuing discussions, the Estate attempted abruptly to close the nursing home. The only action taken by the State was to seek to restrain the precipitous closure and enforce its regulations to protect aged and infirm patients (10 NYCRR 401.3[g]). Had claimants complied with the regulations by submitting "* * * an acceptable plan of closure, they could have terminated the operation of the Abbott Manor within 90 days of notification of closure with the permission of the Commissioner" (App 107a).

The Court of Claims issued an 81-page memorandum decision on August 23, 1982 (App 50a-120a), holding that claimants were entitled to partial summary judgment because a taking had occurred. The Court of Claims held (App 115a):

---

[3]Claim No. 63694, which was also filed, is not at issue here. It is a claim for damages for the pre-receivership period, alleging that the State by fraud and misrepresentation induced the Estate to keep the nursing home open after the death of the licensed operator to the financial detriment of the claimants (App 19a, 52a, 96a).

[4]Petitioner also moved for the summary judgment with respect to Claim No. 63694. That motion was denied because of the existence of triable issues of fact and is not at issue here (App 96a-97a).

> "that the imposition of the Receivership, a possessory remedy, by the Supreme Court of the State of New York as the remedial device to respond to the State's insistence that the Abbott Manor Nursing Home remain operative, the substantive terms of that receivership being adopted from the provisions of Section 2810 of the Public Health Law, constituted a 'temporary taking' which 'requires the Government to pay fair compensation to the owner of the property for its use' ".

The court held further that fair compensation for the use of the property may be measured by a "fair" monthly rental for the facility as well as compensation for any property used by the receivers (App 118a).

By order entered January 27, 1984, the Appellate Division, Fourth Department (143 AD2d 544), affirmed the award of partial summary judgment for the reasons stated in the Court of Claims decision (App 48a). On October 27, 1987, the Court of Claims entered a final judgment, which, in addition, awarded accountant and attorneys' fees. The Appellate Division, Fourth Department (143 AD2d 544) affirmed without opinion (App 14a). The Court of Appeals thereafter granted the State permission to appeal, which brought up for review the prior non-final grant of partial summary judgment (App 5a).

The Court of Appeals reversed. It found that the question in this case is "whether a 'taking' of property occurs giving rise to the obligation to pay fair compensation * * *, when the State requires a nursing home to remain open until reasonable alternative arrangements can be made for the continued care of the patients" (App 1). It held that under the facts and circumstances of this case "the State's actions, preventing the precipitous closing of a nursing home in contravention of the regulations of the Department of

Health, did not constitute a 'taking' of property under the Federal or State Constitutions" (App 1a).

The Court observed that the nursing home industry is subject to extensive regulation in New York State (App 5a). Since supply is tailored closely to demand, the closing of a facility poses a threat to the continuity of essential services. The court noted that Health Department regulation, 10 NYCRR 401.3(g), contemplates this predicament by requiring 90 days' notice of discontinuance and written approval of the Commissioner (App 6a).

The Court held that the application of 10 NYCRR 401.3(g), to require the continuation of nursing home services in Abbott Manor, did not immediately constitute a taking. The Estate was not prevented from selling the home and, in light of the existence of the State regulation, the State's prevention of the Estate's attempt to close Abbott Manor without reasonable prior notice did not, under any reasonable view, affect its investment backed expectations (App 8a-9a).

Moreover, even if the State's action were characterized as tantamount to a physical occupation of the property, a taking had not occurred. The Court agreed with the apparently unanimous view of the courts that have considered the question "* * * that under these circumstances the application of a regulation requiring that a business not terminate services, used for a reasonable period of time so that an agency may devise solutions accommodating the public and private interests, is a valid regulation and does not constitute a taking of private property for public use * * *" (citation omitted) (App 9a-10a).

In considering the delay in closing the nursing home, the Court held that it could not under the circumstances of this case find that such delay became a taking at some point.

Although the Estate argued that an application to close under 10 NYCRR 401.3(g) would have been futile because there were no alternative facilities available to care for Abbott Manor's patients, it never made such an application. Moreover, it appears on the record that soon after the Estate's unlawful attempt to close the nursing home, its desire to close the facility ceased. In conclusion, the Court noted that, most importantly, the Estate made no claim that the State required operation of the nursing home against its wishes beyond a reasonable time. Its arguments were limited to the contention that it had an absolute right to close Abbott Manor and that the State's initial intervention constituted a taking.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The decision of the New York Court of Appeals accords with settled takings jurisprudence.

The Court of Appeals found on this record that soon after the Estate unlawfully attempted to close Abbott Manor without compliance with the notice requirements of 10 NYCRR 401.3(g) that its desire to close the facility ceased (App 11a). Notably, it was the Estate that suggested the imposition of the receivership. As the Court of Appeals found, the State never required operation of the nursing home against its wishes beyond a reasonable time. The Estate has, however, claimed an absolute right to close immediately, notwithstanding that it was in a highly regulated industry that required compliance with State regulations, 10 NYCRR 401.3(g), before patients could be discharged. The Estate's position is that the State's initial intervention to protect patients by preventing the precipitous closing of Abbott Manor in contravention of the State regulation requiring 90 days' notice constituted a taking

(App 11a). The Court of Appeals' ad hoc determination that a taking did not occur under these circumstances is well within settled takings jurisprudence.

Contrary to the Estate's contentions, the decision in *Brooks-Scanlon Co. v. Railroad Comm'n,* 251 US 396 (1920), is not controlling in a case such as this. In its well reasoned decision, the Court of Appeals pointed out that modern cases have emphasized the narrowness of the *Brooks-Scanlon* rule. It noted "the limitation of a person's right to cease business operations consistently has been held not a *per se* taking where a pervasively regulated industry is involved, and there exists an administrative procedure requiring that permission be obtained from a regulatory agency before service to the public is terminated * * *" (citations omitted) (App 8a). Moreover, the regulated business may, for a reasonable time, be made to suffer interim reasonable losses, without compensation, while the agency devises solutions which accommodate both the public and private interests involved (App 8a).

The Court of Appeals ad hoc factual determination in this case, following settled precedents of this Court, establish that a taking has not occurred (App 8a-9a). *See, e.g., Penn Central Transportation Co. v. New York City,* 438 US 104, 124 (1978). The important public character of the State's action is obvious. It did nothing more than seek to protect aged and infirm patients by enforcing its regulation which prohibits the precipitous closure of nursing homes (App 107a). Clearly, the Estate's investment backed expectations were limited by the fact that it was barred specifically by regulation from immediately discontinuing services (App 8a). Moreover, the impact of the Estate's post-receivership losses are circumscribed by the fact that it did not manifest any desire to close the facility after its initial unlawful attempt to do so had failed (App 11a).

Even accepting the Estate's characterization of the State's actions here as tantamount to a physical occupation of the property, the Court of Appeals properly rejected that characterization as being dispositive of whether a taking had occurred under the circumstances of this case (App 9a). Relying on *Keystone Bituminous Coal Ass'n v. DeBenedictus,* 480 US 470, 491-492 (1987), it concluded "that the State may enforce the obligation, embodied in the regulations, that there shall not be immediate terminations of nursing home services, because that use of the property threatens an imminent injury to the public * * *."

The Court of Appeals has not in its holding here carved out any exceptions to this Court's taking jurisprudence. It has only applied the recognized obligation of a business in a highly regulated industry to obtain governmental approval before it ceases operation.

II.

This case does not involve important and recurring questions requiring this Court's consideration.

The Estate points to the decision in *Seawall Assocs v. City of New York,* 74 NY2d 92, *cert denied,* ____ US ____, 110 S Ct 500 (1989), as indicating that there apparently is confusion on the part of the Court of Appeals in particular, and state and federal courts in general, with respect to this Court's taking jurisprudence (Pet, p 22). Because of this purported confusion, the Estate contends that the petition should be granted. Of course, if there were a conflict between two decisions of New York's highest court, petitioners should look to that court for resolution of the conflict. The Court of Appeals decision in *Seawall,* however, does not conflict with that court's ruling in this case.

In *Seawall*, the Court of Appeals held a local law facially invalid as both a physical and regulatory taking. The local law in issue prohibited the demolition, alteration or conversion of single-room occupancy properties and obligated the owners to restore all units to habitable condition and lease them at controlled rents for an indefinite period. 74 NY2d at 99. That local law contrasts sharply with State regulation, 10 NYCRR 401.3(g), applied in this case.

As already noted, that 90-day notice regulation required only that a nursing home remain oper for a reasonable period of time while the governmental agency devised a solution accommodating the public and private interests involved (App 10a). The Court of Appeals ad hoc determination that a taking did not occur as a result of the enforcement of that regulation in this case is neither inconsistent with the *Seawall* decision nor, as indicated in our first point, contrary to settled takings jurisprudence.

CONCLUSION

For the reasons set forth herein, the Petition for Writ of Certiorari should be denied.

Dated: Albany, New York
March 7, 1990

Respectfully submitted,

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Supreme Court, U.S.
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No. 89-1108

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OCTOBER TERM, 1989

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v.

THE STATE OF NEW YORK,

Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of New York

---

PETITIONERS' REPLY BRIEF

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Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of New York

---

PETITIONERS' REPLY BRIEF

I. THE STATE'S ACTION REQUIRED THE ESTATE TO CONTINUE TO OPERATE ABBOTT MANOR AND TO INCUR SUBSTANTIAL OPERATING LOSSES AGAINST ITS WILL

There can be no dispute that the State required Abbott Manor to remain open despite the Estate's desire to close the facility and thereby end its losses on the home's operation. The State's Brief in Opposition implies in various

places that readily-available procedures would have allowed the Estate to close the home at any time before or during the receiverships. That is simply not the case.

Thus, for example, the State asserts, without citation of authority, that it interpreted certain regulations "to mean that a notice of intent to close, coupled with an acceptable orderly plan of closure, renders the Department powerless to prevent a closure." Brief in Opposition at 5. Yet the record is replete with evidence that despite the Estate's oft-stated intent to close, the Department did prevent closure by simply declining to deem any plan of closure "acceptable." It was in fact the State's effort to prevent such closure that first brought this action into the courts. The State also takes comfort in its assertion that the Estate did not object to continuation of the possessory receivership, without acknowledge that the court had at that time obligated the State to compensate the Estate for its losses. If anything is clear from the record of many years of controversy between the State and the Estate, it is that the State required continued operation of the home against petitioner's will.

In any event, the decision of the Court of Appeals plainly rested on such an understanding of the facts. Thus, the court asked whether a taking occurs "when *the State requires* a nursing home to remain open * * *," App. 1a (emphasis added), and "when a business *is required* to continue operations at a loss * * *." App. 7a (emphasis added). As the case comes to this Court, the New York Court of Appeals has answered these questions in the negative. That answer, as demonstrated in the Petition, rests on a serious misunderstanding of the Takings Clause and should not be allowed to stand.[1]

---

[1] For a recent case from the Third Circuit emphasizing, as noted in the Petition, that this Court has "invariably found a taking" where an occupation of property has occurred, see *Pinewood Estates of Michigan* v. *Barnegat Township Leveling Bd.*, 1990 U.S. App. LEXIS 3171, at * 10 (3d Cir. Mar. 7, 1990).

II. THE ISSUES ARE IMPORTANT AND RECURRING

In addition to the reasons set forth in the Petition demonstrating the importance of the takings question presented here, there is another reason why the State is in error to attempting to make the case appear fact-specific. What happened in New York could happen just about anywhere. There are facilities throughout the 50 States and the District of Columbia that provide care for the elderly, including medical, hospice, adult care, and nursing home centers. Thirteen States require license holders to notify the respective governing agencies of an intent to close,[2] and seven States and the District of Columbia statutorily provide for the appointment of a receiver upon notice of an intent to close.[3] Of these jurisdictions, only three States and the District of Columbia allot special funds to provide financial support to meet a receiver's expenses in situations like the one here.[4]

---

[2] These states are: Alaska (Alaska Stat. § 18.07.061 (1983)), Iowa (Iowa Admin. Code 481-57.6(4) (1988), 58.5(4) (1987) and 59.5(4) (1987)), Kentucky (Ky. Rev. Stat. § 216B.065 (Banks/Baldwin 1982)), Minnesota (Minn. R. 9545.0530 Subp. 9 (1987)), Nebraska (Neb. Regs. and Standards, tit. 175, § 003.6A (1989)), New York (N.Y. Comp. Codes R. & Regs. § 401.3(g) (1988)), Ohio (Ohio Rev. Code § 3721.19 (Bank/Baldwin 1989)), Pennsylvania (28 Penn. Code § 201.23 (1987)), Texas (Tex. Admin. Code tit. 25, § 115.8(4) (1988)), Utah (Utah Admin. R. 432-100-2 (1989)), Vermont (Code of Vt. R. § 2-09A (1982)), Washington (Wash. Admin. Code § 248-31-010(5) (1986)) and West Virginia (64 C.S.R. 12 § 6.4.3 (1987)).

[3] These states are: Arkansas (Ark. Code Ann. § 20-10-904 (1989 Supp.)), Colorado (Colo. Rev. Stat. § 25-3-108 (1986)), Florida (Fla. Stat. Ann. tit. 29, § 400.126 (West 1986)), Indiana (Ind. Code Ann. § 16-10-4-20 (West 1989)), Illinois (Ill. Rev. Stat., Ch. 111½, 4153-423, 4153-501 (1987)), Maine (Me. Rev. Stat. Ann. tit. 22, § 7933 (1987)) and Oklahoma (Okla. Stat. Ann. tit. 63, § 1-1932 (1980)).

[4] These states are: Illinois (Ill. Rev. Stat., Ch. 111½, para. 4153-511 (1987)), Oklahoma (Okla. Stat. Ann. tit. 63, § 1-1934 (1980)) and Arkansas (Ark. Code Ann. § 20-10-916 (1989 Supp.)). *See also* D.C. Code § 32-1419 (1981).

Therefore, in most jurisdictions an effort to prevent the closing of homes for the elderly would result in the same situation that obtains here, where the State's use of its naked power would not be backed by a concomitant willingness to pay the license holder fair compensation. With care for the elderly increasing daily, the problem of what to do with the centers that house them cannot go unresolved.

CONCLUSION

For each of the foregoing reasons, and those stated in the Petition, the Court should grant the writ and reverse the decision below.

Respectfully submitted,

E. BARRETT PRETTYMAN, JR.*
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